SUPREME COURT, U.S.

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 548

HARRY RENTON BRIDGES, HENRY SCHMIDT, and J. R. ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

HARRY RENTON BRIDGES, HENRY SCHMIDT, and J. R. ROBERTSON, *Petitioners,* *vs.* UNITED STATES OF AMERICA, *Respondent.*	No. 548

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the District Court for the Northern District of California (hereinafter referred to as the "trial court") denying motions to dismiss the indictment is reported at 86 F. Supp. 922; its opinion overruling objections to the introduction of certain evidence is reported at 87 F. Supp. 14; its opinion upon the revocation of bail for petitioner Bridges pending his appeal to the Court of Appeals is reported at 93 F. Supp. 989.[1] The opinion of the Court of Appeals for the Ninth Circuit vacating and setting aside the order revoking the bail of petitioner Bridges is reported at 184 F. 2d 881. The amended opinion of the Court of

[1] The opinion of the trial court rendered on the Government's motion to stay proceedings in a pending civil denaturalization suit is reported at 86 F. Supp. 931.

Appeals for the Ninth Circuit affirming the judgment below is reported at 199 F. 2d 811, and its additional opinion on supplemental petition for a rehearing en banc,[1a] at 201 F. 2d 254.

Jurisdiction

The judgment of the Court of Appeals was entered on September 6, 1952. The order of the Court of Appeals denying petitioners' petition for rehearing, and its amended opinion, were entered on November 18, 1952. On November 28, 1952, Mr. Justice Douglas entered an order extending the time for filing a petition for certiorari to January 16, 1953. The petition was filed January 14, 1953, and was granted March 9, 1953, limited, however, to questions 1 and 2 presented by the petition for the writ. The jurisdiction of this Court rests on 28 U. S. C. 1254(1). See also Fed. R. Crim. P. 37(b)(2) and 45(a).

Questions Presented

The Circuit Court of Appeals for the Ninth Circuit affirmed a judgment of the District Court of the United States for the Northern District of California, entered upon jury verdicts under a three-count indictment, finding petitioner Bridges guilty of making a false statement in his naturalization proceeding, finding petitioners Schmidt and Robertson guilty of participating in procuring Bridges' naturalization certificate knowing it to have been procured by fraud, and finding all three petitioners guilty of conspiring to defraud the United States by having Bridges make the false statement. The alleged falsity of the statement, or the alleged fraud, under each count, turned upon whether

[1a] *Cf. Western Pacific RR. Corp. v. Western Pacific RR. Co.*, 21 L. W. 4297, April 6, 1953; *infra*, p. 11, n. 10a.

petitioner Bridges had ever been a member of the Communist Party. The questions are:

(1) Whether this proceeding is barred by the statute of limitations.

(2) Whether, in view of prior adjudications (including the determination of this Court in *Bridges* v. *Wixon*, 326 U. S. 135), this proceeding is barred, in whole or in part, by the principles of *res judicata*, or estoppel, or the due process clause of the Fifth Amendment.

STATUTES INVOLVED

The relevant provisions of (a) 18 U. S. C. 371, on which Count I of the indictment is based; (b) 18 U. S. C. 1015(a), on which Count II is based, (c) 8 U. S. C. [1946 ed.] 746(a) on which Count III is based, (d) 18 U. S. C. 3282, the applicable statute of limitations, (e) 18 U. S. C. 3287, the Wartime Suspension Act, and (f) other statutory provisions useful for the consideration of this case, are set forth in the Appendix, pp. 1-11.

STATEMENT

Harry R. Bridges has resided continuously in the United States since 1920, when he entered legally as an immigrant seaman from Australia (Tr. 43). He was naturalized September 17, 1945. His wife and children are native-born American citizens. He is the President, and the other petitioners are or have been officers, of the International Longshoremen's and Warehousemen's Union.

From 1934 to 1945, Bridges was the subject of investigations and proceedings designed to deport him on the ground that he was or had been a member of the Communist Party. An investigation of Bridges' alien status, undertaken in 1934 by the San Francisco District Director of Immigration and Naturalization working in conjunction with the San Francisco Police Department, resulted in a report by the District Director that the investigation had "failed to show that he [Bridges] is in any manner connected with the Communist Party, or any radical organization" (Tr. 47). Thereafter, the Commissioner of Immigration and Naturalization appointed three members of his staff to investigate charges against Bridges; their report, prepared in 1936, concluded (Tr. 49):

> "In short, whenever any legal ground for the deportation of Bridges has been brought to the attention of the Department of Labor, it has been investigated but, invariably, it has been found that he was in the clear, and that his status as an immigrant was entirely regular".

In 1937, the Department of Labor, by its then Solicitor (Gerard D. Reilly), conducted a further investigation, during the course of which Bridges was put under oath by the Solicitor and testified as follows (Tr. 49-50):

> "Q. Were you—or are you—a member of the Communist Party?
> "A. No."

In 1938, the Department of Labor issued a warrant for Bridges' arrest and deportation on the ground that his presence in the United States was in violation of the immi-

gration laws, and a lengthy[2] hearing was held before a Trial Examiner specially appointed by the Secretary of Labor (Tr. 50-55). The charge in that proceeding was that Bridges "became and now is" a member of the Communist Party.[3] During the course of the hearing before the Trial Examiner, Bridges testified under oath as follows (Tr. 53):

> "Q. Are you now a member of the Communist Party?
>
> "A. No.
>
> "Q. Or have you at any other time in the past been a member of the Communist Party?
>
> "A. No."

At the conclusion of the hearing, the Trial Examiner (the Honorable James M. Landis) transmitted to the Secretary of Labor his findings and conclusions that "the evidence therefore establishes neither that Harry R. Bridges is a member of nor affiliated with the Communist Party of the

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[2]The taking of testimony occupied 45 days; 32 witnesses were called by the Government and 27 by Bridges; 274 exhibits were introduced by the Government and 136 by Bridges; the stenographic transcript of the hearing comprised 7724 pages, exclusive of the exhibits. Tr. 53; see also *In the Matter of Harry R. Bridges—Findings and Conclusions of the Trial Examiner* (U. S. Government Printing Office, 1939).

[3]More precisely, the charge, under the statute then in effect, was that Bridges "became and now is a member of an organization . . . that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States." However, in partial response to a request for a bill of particulars, the Government replied that the organization in question was the Communist Party of the United States of America. Tr. 51-53; see also *In the Matter of Harry R. Bridges, supra*, pp. 135-36. Other charges, not directly relevant here, related to "affiliation" with the Communist Party, and to the distribution of printed matter advocating the overthrow of the Government by force and violence.

United States of America."[4] The Secretary of Labor sustained the Trial Examiner's findings, cancelled the warrant of deportation, and dismissed the proceedings, on January 8, 1940.

Early in 1940, the House of Representatives passed a bill directing the Attorney General to take Bridges into custody and deport him "notwithstanding any other provisions of law". (H. R. 9766, 76th Cong., 3rd Sess.). The Attorney General, in a letter to the Senate Committee which was considering the bill, expressed the opinion that such special legislation, directed against an individual, would be unconstitutional (Sen. Rep. 2031, 76th Cong., 3rd Sess., p. 9), and the bill was not reported to the Senate. However, Congress thereupon proceeded to amend the statute to provide for deportation of any alien who was "at the time of entering the United States, or has been at any time thereafter" a member of or affiliated with an organization of the character attributed to the Communist Party in the Landis proceeding.[5] Although this statute was framed in general terms, it is apparent that the sponsor of the legislation in the House of Representatives had as his chief purpose the laying of a basis for further deportation proceedings against Bridges.[6]

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[4]Tr. 54-55; see also *In the Matter of Harry R. Bridges, supra*, pp. 132-134. The Trial Examiner's findings were submitted to the Secretary of Labor on December 28, 1939.

[5]Act of June 28, 1940, 54 Stat. 673, 8 U. S. C. 137. The year before, this Court had ruled that the statute then in force required present, rather than past, membership or affiliation as the basis for deportation. *Kessler v. Strecker*, 307 U. S. 22.

[6]On the floor of the House of Representatives, Congressman Hobbs declared "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges and all others of similar ilk". 76 Cong. Rec. 9031.

Early in 1941, the Department of Justice[7] caused a new warrant for the arrest and deportation of Bridges to be issued, charging that Bridges "has been a member of or affiliated with" the Communist Party.[8] Another exhaustive hearing (Tr. 59) was held before the specially designated Presiding Inspector (the Honorable Charles B. Sears). The volume of evidence, both testimony and exhibits, was comparable to that in the Landis proceeding. On September 26, 1941, the Presiding Inspector submitted to the Attorney General his memorandum summarizing the evidence and his proposed findings of fact and conclusions of law, including findings that Bridges had been a member of and affiliated with the Communist Party. Accordingly, he recommended deportation.

The subsequent proceedings leading up to the decision of this Court in *Bridges* v. *Wixon*, 326 U. S. 135, are summarized in the opinion in that case (at 139-40):

> "The case was heard by the Board of Immigration Appeals which found that Harry Bridges had not been a member of or affiliated with either of those organizations at any time after he entered this country. The Attorney General reviewed the decision of the Board and rendered an opinion in which he made findings in accordance with those proposed by

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[7] By that time, the Immigration and Naturalization Service had been transferred from the Department of Labor to the Department of Justice.

[8] The warrant was dated February 12, 1941. Like the earlier one, it specifically charged membership or affiliation with "an organization, association, society, or group that believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States." However, the Government specified the Communist Party in its opening statement. Tr. 56-58; see also *In the Matter of Harry Renton Bridges*, Immigration and Naturalization Service, Department of Justice, File No. 55073/217.

> the inspector and ordered Harry Bridges to be deported. A warrant of deportation was issued. Harry Bridges surrendered himself to the custody of the respondent and challenged the legality of his detention by a petition for a writ of *habeas corpus* in the District Court for the Northern District of California. That court denied the petition and remanded petitioner to the custody of respondent. 49 F. Supp. 292. The Circuit Court of Appeals affirmed by a divided vote. 144 F. 2d 927, 944. The case is here on a petition for a writ of certiorari which we granted because of the serious character of the questions which are presented."

This Court reversed the judgment below,[9] and the writ of habeas corpus was granted. On June 23, 1945 (5 days after the decision), Bridges filed at the San Francisco office of the Immigration and Naturalization Service his preliminary form for a petition for naturalization. On August 8, 1945, he appeared before an examiner in connection with this petition; Schmidt and Robertson also appeared and witnessed the petition. Robertson was called at the last minute in place of a prospective witness whose citizenship qualifications were not established to the satisfaction of the examiner (Tr. 459-61).

On September 17, 1945, Bridges, with the same two witnesses, appeared in the Superior Court of the State of California, and testimony was taken in support of the petition. The witnesses testified that they were American citizens, that they had known Bridges for five years and knew him to be of good moral character; they vouched for his loyalty to the United States and recommended him to

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[9]The grounds of the judgment of this Court are discussed *infra*, pp. 66-69.

citizenship (Tr. 134-135). Government counsel stated that the witnesses were satisfactory, and they were excused. Bridges was then examined. Among the many questions to him was the same question that had been put in the prior administrative proceedings, to which the same answer was given (Tr. 138):

> "Q. Do you now or have you ever belonged to the Communist Party in the United States?
> "A. I have not, I do not."

After further examination on the Communist issue, Government counsel stated that he had no further evidence and no objection to naturalization (Tr. 144), and Bridges was naturalized.

On May 25, 1949, three years, eight months, and eight days after the naturalization decree, this three-count indictment (Tr. 3-8) was filed. Count I charged the petitioners with conspiracy to defraud the United States, under Section 37 of the Criminal Code, 18 U. S. C. [1946 ed.] 88. The fraud charged was that Bridges' testimony was false (and known to the petitioners to be false), in that he allegedly had been a member of the Communist Party from 1933 to September 17, 1945. The overt acts alleged to ground the conspiracy were the several steps of the naturalization proceeding. Counts II and III of the indictment were brought under Section 346 of the Nationality Act of 1940, 8 U. S. C. 746. Count II charged Bridges with making a willfully false answer to the question with respect to Communist Party membership. Count III charged Schmidt and Robertson with assisting Bridges to obtain a certificate of naturalization, knowing it to have been procured by fraud.

After the indictment was returned, Bridges moved its dismissal (Tr. 10-26) on grounds which included all the

issues embraced in the two questions presented here. Petitioners Schmidt and Robertson moved to dismiss on such of the foregoing grounds as were applicable to them (Tr. 27-41, 8312). The motions to dismiss were denied (86 F. Supp. 922).

After a long trial, the jury returned verdicts of guilty against Bridges on Counts I and II of the indictment, and against Schmidt and Robertson on Counts I and III of the indictment (Tr. 220-222). Motions in arrest of judgment and for new trial were duly made (Tr. 223-228). All were denied (Tr. 229), and Bridges was sentenced to concurrent terms of two years on Count I and five years on Count II (Tr. 230, 235-236). Schmidt and Robertson were each sentenced to concurrent terms of two years on Counts I and III of the indictment (Tr. 231-234, 237-240).

Ten weeks later, the Government moved to revoke the order granting bail to Bridges, and to remand him to the custody of the Marshal. Over objection, and despite the Government's admission that the appeal presented substantial questions, Bridges was incarcerated in the San Francisco County Jail (93 F. Supp. 989). Three weeks later, he was released by order of the Court of Appeals (184 F. 2d 881).[10]

Appeals from the judgment of conviction were filed to the Court of Appeals for the Ninth Circuit, which affirmed it on September 6, 1952. A petition for rehearing was denied, on the basis of an amended opinion, on November 18, 1952. A supplemental petition, reiterating the request

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[10]The grounds urged by the Government as a basis for the revocation of bail did not favorably impress the Court of Appeals, which declared that the courts should not be called upon to act as "instruments of executive expediency" or "mere instruments for carrying into effect the arbitrary will" of the executive branch. 184 F. 2d at 887.

for a hearing before the Court of Appeals *en banc*, was denied with a further opinion on December 29, 1952.[10a]

In the petition for a writ of certiorari, the petitioners did not ask this Court to review such questions as whether or not there was sufficient evidence at the trial to sustain a conviction under the indictment. Nonetheless, in its memorandum on the petition, the Government saw fit to include (pp. 4-10) a lengthy summary of the evidence it adduced at the trial "to show that prior to, at the time of, and subsequent to, these naturalization proceedings, Bridges was in fact an active member of the Communist Party, known to be such by the other petitioners."

We are reluctant to assume that this one-sided summary was introduced into the Government's memorandum for purposes of psychological warfare. It is perhaps more reasonable, and certainly more charitable, to infer that the summary was included because of understandable worry that the failure, at two prior and protracted proceedings with two different sets of Government witnesses, to adduce sufficient evidence to support a finding that Bridges is or has ever been a Communist, might arouse curiosity as to the character and substance of the proof upon a third inquiry, with a third set of Government witnesses, into the same question.

Under the questions here and now open to review by this Court, we do not deem it appropriate to discuss the sufficiency of the evidence. However, in analyzing the question of, and the Government's arguments with respect to,[11] the legal effect of the prior adjudications of the membership

[10a] In *Western Pacific R. R. Corp.* v. *Western Pacific R. R. Co.*, 21 L. W. 4297, April 6, 1953, this Court remanded to the Court of Appeals for the Ninth Circuit causes in which an application for leave to be reheard en banc had been stricken. Substantially the same order was made by the division below in this case (201 F. 2d 254, 255; Tr. 8456) despite petitioners' prayer on two separate occasions that the rehearing be heard en banc (Tr. 8297-8347, 8437-8454, especially 8449).

[11] See the Government's memorandum on certiorari at pages 14-15, especially footnote 8.

charge, it is necessary to advert to the Government's evidence, and the several adjudicators' evaluations thereof, at each of the several proceedings.[12]

SUMMARY OF ARGUMENT

I

THIS PROCEEDING IS BARRED BY THE GENERAL THREE-YEAR STATUTE OF LIMITATIONS.

A. The 1942 Wartime Suspension of Limitations Act is inapplicable. (1) Its 1921 predecessor, substantially identical, was repeatedly and unanimously interpreted by this Court as applying only to offenses wherein fraud was an essential element of the statutory crime. *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *Scharton*, 285 U. S. 518.[13] This construction is in harmony with the statutory purpose to give the Department of Justice additional time to discover and gather evidence of frauds against the Government; if fraud need not be charged or proved, the basis of the suspension is removed. Following these decisions, Congress in 1942 re-enacted substantially the same language which had been thus construed. (2) The requirement of fraud as an essential element is equally applicable to conspiracy charges; the test is whether fraud is such an element of the offense which is the object of the conspiracy. *United States* v. *McElvain*, 272 U. S. 633; see *Braverman* v. *United States*, 317 U. S. 49, 55. (3) Independently of the foregoing, and as the legislative history

[12] *Infra*, p. 85. See also the Appendix to this brief, pp. 38-41.

shows, the Suspension Act is directed at *pecuniary* frauds. That is the "usual and primary sense" of the term "defrauding". *United States* v. *Cohn*, 270 U. S. 339. The 1921 suspension was never held applicable to non-pecuniary frauds, and it has been held that the 1942 Suspension Act is so limited. *Marzani* v. *United States*, 168 F. 2d 133 (D. C. Cir.), twice affirmed by an equally divided Court, 335 U. S. 895 and 336 U. S. 922. If not pecuniary, the fraud must be connected with the "hurly-burly of war". *United States* v. *Gottfried*, 165 F. 2d 360 (2d Cir.). (4) None of the counts of this indictment meets any of the foregoing requirements. Fraud is not an essential element of the offense of making a false statement in a naturalization proceeding. *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir.). Assuming that fraud was an incident or even the purpose of the false statement, that does not make it an essential element of the charge or proof, as is required by the *Novack* and *Scharton* cases. The conspiracy count, therefore, stands on no better footing; so held in the *McElvain* case. Where Congress has seen fit to eliminate the requirement of fraud as the basis for suspension of the limitation, it has done so by specific legislation. *Braverman* v. *United States*, *supra*. Nor do any of the counts charge fraud which is either pecuniary or in any way related to the war emergency. (5) The Government's arguments for application of the Suspension Act have all been made before and rejected by this Court. (6) Furthermore, if the Suspension Act were to be given the scope for which the Government contends, the beneficial and established policy of repose underlying the general statute of limitations would be subverted. Relaxation of the requirement of fraud as an essential element, coupled

with the Government's use of charges cast in the language of "conspiracy to defraud", would sweep a very large amount of the federal criminal jurisdiction within the Suspension Act.

B. Counts II and III are not saved under the former five-year statute of limitations for offenses under the Nationality Act, which was repealed in 1948. The court below, on rehearing, so decided unanimously, as did the Court of Appeals for the Second Circuit. *United States* v. *Obermeier, supra.* When Congress has desired to preserve the original period of limitations for offenses committed before a change in the period, it has made express provision to this effect. Therefore, the general language in the repealer preserving "rights or liabilities now existing" does not perpetuate the repealed statute of limitations. The cases cited by the Government are not in point, and the Government's position leads to the indefensible anomaly that prosecution for an offense committed on August 31, 1948 would not be barred until August, 1953, whereas an identical offense committed the *following* day would be barred in September, 1951.

II

THIS PROCEEDING IS BARRED BY PRIOR ADJUDICATIONS, UNDER THE PRINCIPLES OF *RES JUDICATA*, ESTOPPEL, AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Secretary of Labor's determination in January, 1940, that Bridges was not then a Communist, conclusively established that fact in this proceeding. The doctrine of estoppel by judgment is clearly governing. *Cromwell* v.

County of Sac, 94 U. S. 351; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1; *United States* v. *Balt. & Ohio R. R. Co.*, 229 U. S. 244. That doctrine is applicable to plenary, quasi-judicial decisions of administrative tribunals. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, and numerous other decisions of this Court and other courts. *Pearson* v. *Williams*, 202 U. S. 281, contains nothing to the contrary, and its reasoning supports our position. Since the Landis-Perkins decision conclusively established that Bridges was not a Communist in 1940, that factual issue was foreclosed at the trial on this indictment, and the evidence and issues should have been correspondingly limited. But the trial court refused so to limit the issue for the jury, and instructed the jury to disregard the prior determinations. This requires reversal of the judgments of conviction.

B. The second (Sears-Biddle) deportation proceeding, together with this Court's decision on review thereof by *habeas corpus*, conclusively established that Bridges had not been a Communist at any time prior to 1941 (the year of the Sears proceeding). *Bridges* v. *Wixon*, 326 U. S. 135. That case held that the due process requirement of some evidence, to support the administrative determination that Bridges was a Communist, had not been met. The issue of fact with respect to Bridges' membership prior to 1941 was thereby conclusively resolved in the negative. The cases cited under *A* above are all in point, as is also *Sealfon* v. *United States*, 332 U. S. 575; see *Collins* v. *Loisel*, 262 U. S. 426, 430. The Government itself treated the *Wixon* decision as final; it abandoned the deportation proceeding, released Bridges' bail, and did not oppose Bridges' naturalization. The factual issue at the trial should therefore have been limited to Bridges' alleged membership after 1941, but

the trial court refused so to limit the evidence or the issue before the jury, and instructed the jury to disregard the prior determination. This requires reversal of the judgments of conviction.

C. The naturalization decree of September 17, 1945 conclusively determined between the parties that Bridges was not a Communist at any time during the entire period covered by the indictment. *Tutun* v. *United States*, 270 U. S. 568; *United States* v. *Throckmorton*, 98 U. S. 61. The question of Bridges' Communist membership was raised during the naturalization proceedings. It was a known issue which had been repeatedly and freshly litigated between the parties; the Government had been investigating the issue for many years theretofore. The present proceeding re-litigates, in the guise of a perjury indictment, the very issue adjudicated upon naturalization. *Chitwood* v. *United States*, 178 Fed. 442 (8th Cir.). The Government relies on *Knauer* v. *United States*, 328 U. S. 654, but that decision was expressly limited to a misrepresentation of present state of mind, not of past fact. Every consideration of judicial policy requires that the naturalization decree here be held conclusive. See *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 298-9; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48. This requires reversal of the judgments and dismissal of the indictment.

D. The entire course of the several proceedings against Bridges, involving repetitious actions based on the same factual issue, and harassment of an individual on the same charge but in different proceedings over the course of many years, violates the due process clause of the Fifth Amendment. Under the decision below, the Government can follow one protracted and exhausting proceeding with another *ad*

nauseam in order finally to get the result it wants. When this Court has allowed repeated criminal trials on the same charge, the trials have been in the same proceeding, and the decisions have rested on this circumstance. *Trono* v. *United States*, 199 U. S. 521; *Stroud* v. *United States*, 251 U. S. 15; *Palko* v. *Connecticut*, 302 U. S. 319; *Brock* v. *North Carolina*, 344 U. S. 424. In cases such as these there are strong statements in the opinions that the Government cannot repeatedly institute new proceedings on the same charge; see also Mr. Justice Holmes' dissenting opinion in *Kepner* v. *United States*, 195 U. S. 100, 134; Mr. Justice Frankfurter's concurring opinion in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 553; Chief Justice Vinson's dissent in *Brock* v. *North Carolina*, *supra*, at pages 429-440. Disregard of traditional principles and rudimentary concepts of fair play has led here to the perpetration of the very abuses which those concepts and principles are intended to prevent. What has been done here offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." See *Adamson* v. *California*, 332 U. S. 46, 67-68. The judgments must therefore be reversed and the indictment dismissed.

CONCLUSION

After reviewing the case bit by bit, in conclusion it must be viewed as a whole. After examining the statute of limitations, the doctrine of *Res Judicata*, and the due process

clause severally, the Court should recognize the impact of these principles as a whole, for they are not on related items but are based on common judicial policies of repose and fairness, and thus are components of a corpus. In conjunction, as well as severally, the Constitution, the statutes, and traditional principles of the common law require that the judgments below be reversed and the indictment dismissed.

ARGUMENT

I

THIS PROCEEDING IS BARRED BY THE STATUTE OF LIMITATIONS.

All the acts charged in each count of the indictment concededly occurred in 1945, more than three years before its filing in 1949. However, the Court below held that the running of the applicable three-year statute of limitations (18 U. S. C. 3282, Appendix p. 3) was suspended by the Wartime Suspension of Limitations Act (18 U. S. C. 3287, Appendix pp. 3-4). That act suspended until three years after the termination of hostilities[13] the running "of any statute of limitations applicable to any offense . . . involving fraud or attempted fraud against the United States or any

[13] The President proclaimed the termination of hostilities on December 31, 1946 (12 Fed. Reg. 1).

agency thereof in any manner, whether by conspiracy or not". The question, therefore, is whether the offenses charged in this indictment are within the ambit of the Suspension Act.[14]

A. The Wartime Suspension of Limitations Act is not Applicable to the Offenses Charged in this Indictment.

The Suspension Act, insofar as it relates to "offenses involving fraud or attempted fraud against the United States,"[15] was enacted in 1942 (Act of August 24, 1942 c. 555, Sec. 1, 56 Stat 747). It is derived from, and substantially identical with, the comparable statute enacted after World War I (Act of November 17, 1921, c. 124, 42 Stat 220, Appendix pp. 4-5). That statute added a proviso to the general three-year statute of limitations (R. S. 1044), fixing a six-year period for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner."

By a series of unanimous decisions of this Court, and in accordance with the clear meaning and purpose of the statute, it became the settled construction of the 1921 act that it applied only where fraud was a necessary element

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[14]In its memorandum on certiorari, the Government also contended that a saving provision of the Act of June 25, 1948, revising Title 18 (Sec. 21, 62 Stat 683), preserved as to Counts II and III the earlier five year Statute of Limitations (8 U. S. C. [1946 ed.] 746 g, Appendix pp. 2-3) applicable in 1945 to offenses against the naturalization laws. The Court below rejected the Government's contention, which also failed in *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir.), certiorari denied 340 U. S. 951. Against the contingency that the Government will continue to press this argument, the point is discussed *infra*, pp. 48-52.

[15]The two other categories of offenses covered in the Wartime Suspension Act are concededly not applicable in this proceeding.

of the crime charged. *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Scharton*, 285 U. S. 518; see *Braverman* v. *United States*, 317 U. S. 49, 55. Furthermore, the legislative history of both the earlier and the present statutes, and their uniform construction by the lower federal courts, limit their application to frauds, which are pecuniary in nature, or arise out of what Judge Learned Hand has called "the hurly-burly of war". See *United States* v. *Gottfried*, 165 F. 2d 360, 368 (2d Cir.).

None of the counts in this indictment meets any of these requirements. Apart from the decision below, there is, to our knowledge, no case in which the Suspension Act or its predecessor has been held applicable to offenses such as those charged against petitioners. The Government's arguments have been repeatedly and squarely rejected by this Court. Their acceptance now would extend the scope of the Suspension Act far beyond its wording and purpose, and would fairly obliterate the general three-year statute of limitations.

1. The Suspension Act is not applicable unless fraud is an essential element of the statutory crime charged.

The 1942 Suspension Act and its 1921 predecessor were enacted as exceptions, necessitated by extraordinary war-time circumstances, to the fixed policy of the law in favor of repose. As Mr. Justice Story put it in *Bell* v. *Morrison*, 1 Pet. 351, 360 (U. S., 1828): "A statute of limitations is a wise and beneficial law . . ." See also *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390 (U. S., 1869); *Wood* v. *Carpenter*, 101 U. S. 135, 139 ("Statutes of limitations are vital to the welfare of society and are favored in the law.").

The Suspension Act, too, has an important policy, but it is not the policy of swallowing up limitations altogether, and it does not reach the offenses charged against the petitioners. The 1921 legislation was requested by the Attorney General in order to reach war frauds not yet uncovered (H. R. Rep. 365, 67th Cong., 1st Sess.). The similar purpose of the 1942 Suspension Act, as stated in both the House and Senate Committee reports (H. R. Rep. 2051 and Sen. Rep. 1544, 77th Cong., 2d Sess., Appendix pp. 11-17), is "to suspend any existing statute of limitations applicable to offenses involving the defrauding or attempt to defraud the United States or any agency thereof, for the period of the present war", and it was intended to "afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government."

In the light of the wording and revealed purpose of the Suspension Act, therefore, it is apparent that it does not embrace any offense unless fraud is an essential element of the crime, which must be charged and proved. Since the purpose was to give the Department of Justice more time to discover frauds, and to assemble the evidence necessary to their proof, the Act does not apply to offenses where the Government is obliged neither to charge nor to prove fraud. Therefore, the decisions of this Court holding the Suspension Act inapplicable except to offenses wherein fraud is an essential element, are in accordance with both the letter and the purpose of the 1921 proviso, and are equally governing under the present Suspension Act.

It is to be remarked that neither the 1942 nor the 1921 acts undertook to suspend the statute of limitations with respect to offenses lacking fraud as an essential element, where fraud was nonetheless an incidental concomitant of

the crime or even where the very purpose was fraudulent. Neither act attempts to cover false statements, in and of themselves, for this would have been beyond the Congressional purpose to give the Department of Justice more time to discover and prepare cases where the fraud had to be charged and proved.

Therefore, it was unanimously held in *United States* v. *Noveck*, 271 U. S. 201, that the 1921 statute did not cover an indictment for perjury for false swearing to an income tax return "for purposes of defrauding the United States." The defendant was thus charged with both a false statement and a clearly fraudulent purpose to deprive the Government of its lawful taxes. "But the alleged purpose to defraud the United States is not an element of the crime defined in Section 125 [perjury] on which the indictment is based." *United States* v. *Noveck, supra,* at 203. No more is fraud an element of the crime of making false statements in naturalization proceedings, the offense charged in Count II of the indictment in the present case.[16]

The holding of the *Noveck* case was reaffirmed in *United States* v. *Scharton*, 285 U. S. 518. The *Scharton* case construed a proviso in the Revenue Act of 1926, Section 1110(a), similar in language to the 1921 proviso. The defendant was charged with wilfully attempting to evade and defeat taxes by falsely understating his income. Despite the Government's emphasis on the obvious fraudulent purpose, this Court unanimously held that the offense charged did not fall under the proviso, and was barred by the three-year statute of limitations. Mr. Justice Roberts pointed out that there were numerous other provisions of the Revenue Laws which expressly made intent to defraud an element of

[16] *Infra*, pp. 34-37.

the crime, but that such intent was not an element in Section 1114(b), under which the defendant was indicted. He declared (at 522) that statutes of limitations must be "liberally interpreted in favor of repose", and that the suspending proviso should not be "extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses."

Not only are the *Noveck* and *Scharton* decisions sound as a matter of first impression under the 1921 and 1926 provisos, and squarely applicable in construing the 1942 Wartime Suspension Act. They were, furthermore, "on the books" as the settled construction of those statutes at the time that Congress adopted their same language in the 1942 enactment. True, re-enactment after a decision, has not, in every case, been held conclusive of legislative intent to embody the judicial gloss. *Girouard* v. *United States*, 328 U. S. 61. But here all the factors which call for the customary application of the re-enactment doctrine are present. Not only in 1942, but twice in 1944 (when the second and third clauses of the Suspension Act were added), and again in 1948 (when there was a codification), Congress re-enacted the same language.[17]

Three times between 1944 and 1948, therefore, the 1942 re-enactment has been "repeated". *United States* v. *Wil-*

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[17]Clause (2) of the Suspension Act, covering offenses in connection with the handling of government property, comes from the Surplus Property Act, 58 Stat. 667. Clause (3), dealing with offenses arising out of government contracts, comes from the Contract Settlement Act of 1944, 58 Stat. 781. Both statutes re-enacted Clause (1) in language identical with that enacted in 1942, but changed the suspension date from June 30, 1945 to three years after the proclamation of the end of hostilities. The 1948 codification made purely grammatical changes; the words "defrauding or attempts to defraud" were replaced by "fraud or attempted fraud". See 18 U. S. C. 3287, Reviser's Note; H. R. Rep. No. 304, 80th Cong., 1st Session.

liams, 341 U. S. 70, 81. Here, as in *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, the statute had been explicitly and repeatedly interpreted. As this Court stated in the *Gullett* case, *supra*, (at 366): "Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts."

The legislative history is equally compelling. In 1941, hearings were held by a House Sub-Committee on a bill to suspend the statute of limitations on all offenses punishable under Federal law. In opposing the bill, the Attorney General suggested that it be amended so as to apply only "to offenses involving frauds against the United States as was done in 1921 by the Act of November 17, 1921".[18] And this is just what was in fact done at the next session of Congress. Both the House and Senate reports on the 1942 statute relied heavily upon the committee report of 1921 (H. R. Rep. 365, 67th Cong. 1st Sess., Appendix, pp. 13, 16), and the same statutory language was adopted.[19]

Therefore, the wording and purpose of the Wartime Suspension Act and its legislative history all dictate the conclusion that it is to be construed in accordance with the decisions of this Court in the *Noveck* and *Scharton* cases. False statements are not sufficient to bring the Suspension Act into play: fraud must be an element of the statutory crime charged.

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[18] Hearings on H. R. 4916, 77th Cong., 1st Sess.; Appendix, pp. 19-20.

[19] The House did not accept a suggestion by Congresswoman Rankin (the sponsor of the 1941 bill) to expand the suspension so as to cover all Federal offenses. 88 Cong. Rec. 4759. In the Senate, Senator (now Mr. Justice) Burton, very briefly, called to his colleagues' attention that the 1942 statute was basically a re-enactment of the 1921 Act. 88 Cong. Rec. 6160; Appendix, p. 23.

2. If fraud is not an essential element of the offense charged, the Suspension Act is not made applicable by including in the indictment a charge of conspiracy to defraud the United States.

Both the 1942 and 1921 Acts are expressly applicable to fraudulent offenses "whether by conspiracy or not".[20] Section 37 of the Criminal Code, 18 U. S. C. [1946 ed.] 88 (now 18 U. S. C. [1948 ed.] 371) makes it unlawful for two or more persons to "conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose . . .". Count I of this indictment is laid under the second clause of the quoted language.

It is clear that where defrauding the United States is an essential element of the substantive offense, a conspiracy to commit that offense falls within the Suspension Act. *Miller* v. *United States*, 24 F. 2d 353 (2d Cir.); *Falter* v. *United States*, 23 F. 2d 420 (2d Cir.). However, if fraud is not an element of the offense, a charge of conspiracy to commit that offense, even though laid under the second clause of Section 37, stands on no different footing; neither is within the Suspension Act.

This conclusion is an obvious corollary of the principles already discussed. If there be a conspiracy to commit an offense of which fraud is not an element, the conspiracy alleged is properly lodged under the first clause of Section 37 covering conspiracies "to commit any offense against the United States". The allegation of fraud would be just as much surplusage in the conspiracy count as it would

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[20] It appears that, when the grammar was altered by the 1948 codification, the clause relating to conspiracy was left without the verb which was previously available by reference back.

be in a substantive count. The Government need neither charge nor prove fraud in order to proceed under either Section 37 or the statute proscribing the offense which was the object of the conspiracy and, therefore, such an indictment would fall outside the purpose of the Suspension Act, for reasons already stated.[21] Equally it falls outside the Act's wording, which covers "any offense . . . involving fraud . . . whether by conspiracy or not", and thus clearly makes the nature of the offense itself the test of the Suspension Act's applicability to the conspiracy.[22]

In other words, the principles enunciated in the *Noveck* and *Scharton* cases are equally applicable to the offense "whether by conspiracy or not". No more was the Government's surplus allegation of fraudulent purpose in the *Noveck* case effective to bring the case within the suspension, no more is the framing of a conspiracy charge under the "fraud" clause of Section 37 effective for this purpose if the fraud is not an essential element of the offense. Had a second person been implicated with Mr. Noveck, a conspiracy count added to the indictment in that case would have done nothing to bring the suspension into play.

The foregoing reasoning is clearly supported by the decisions of this Court. In *United States* v. *McElvain*,

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[21] *Supra*, pp. 20-24.

[22] The court below came to this same conclusion. In discussing the statement in *United States* v. *McElvain*, 272 U. S. 633, 639 that "The language of the [1921] proviso cannot reasonably be read to include all conspiracies as defined by Section 37," Judge Stephens explained (199 F. 2d at 823) that this was "because the proviso contains the words 'whether by conspiracy or not' which establishes that it is the substantive offense or the object of the conspiracy which determines the scope of the proviso". The court below erroneously concluded that the substantive offense charged in Count II embodied fraud as an essential element; had it reached the correct conclusion on Count II, its own reasoning would thus have required the dismissal of Count I as well.

272 U. S. 633, the defendant was indicted under Section 37 for conspiracy to defraud the United States of taxes by filing false income tax returns. Offenses under the revenue laws were expressly excluded from the three-year statute of limitations to which the 1921 suspension was a proviso. This Court unanimously ruled that the suspending proviso did not cover conspiracies, even though charged as fraudulent under the second clause of Section 37, unless the substantive offense which was the object of the conspiracy was also covered; the indictment was therefore held to be barred. Mr. Justice Butler stated (at p. 639):

> "The language of the proviso cannot reasonably be read to include all conspiracies defined by Section 37. But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offenses which it covers."[23]

Following the decision in the *McElvain* and *Scharton* cases, Congress in 1932 amended the suspending proviso in the Revenue Act of 1926 (which had been construed in the *Scharton* case) by adding the following paragraph (47 Stat. 169, 228 [Sec. 1108 of Revenue Act of 1932]): "For offenses arising under Section 37 of the Criminal Code . . .

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[23] See also *In re Doyle*, 42 F. 2d 686 (S. D. N. Y.), at p. 691 (reversed as to other matters, *United States* v. *Doyle*, 47 F. 2d 1086 (2d Cir.)):

> "In view of the decision in the McElvain Case, I think that the statute of limitations applicable to a conspiracy to commit a federal crime depends on the statute applicable to the substantive offense which is the object of the conspiracy.
>
> "The rationale of such a holding is perfectly obvious, because, if it were otherwise, a prosecuting officer might, by making his indictment count in conspiracy, increase the statute of limitations, and, in effect, hold a defendant for a crime which had already been outlawed."

when the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitations shall also be six years". In *Braverman* v. *United States*, 317 U. S. 49 (1942), the defendants were convicted, under Section 37, of conspiracy to violate numerous provisions of the revenue laws covering tax evasion. This Court held that the indictment fell within the 1932 addition and, therefore, was not barred. Writing for a unanimous court, Chief Justice Stone reaffirmed the principles laid down in the *McElvain* and *Scharton* cases, and then observed (at 55): "To be within this last paragraph [the 1932 addition] it is not necessary that the conspiracy have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element." In other words, lacking the 1932 amendment, the indictment would clearly have been barred under the *McElvain* and *Scharton* decisions.

The committee reports and debate on the 1942 Suspension Act do not advert to its scope with respect to conspiracy. Here again, however, the principle of legislative re-enactment[24] is clearly applicable with respect to the *McElvain* decision. That decision made it clear, prior to the 1942 Act, that conspiracies did not come within the 1921 statute unless the offense, toward which the conspiracy was directed, was itself within the statutory suspension. The 1942 statute, by re-enacting language which had been so construed, should be interpreted in like manner.

Indeed, the basis for application of the re-enactment principle is greatly reinforced by the 1932 amendment to the Revenue Act proviso which was involved in the *Braverman* case. The conference report of the House on the 1932

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[24]See *supra*, pp. 23-24.

Revenue Act (H. R. Rep. 1492, 72nd Cong., 1st Sess., p. 29, Appendix pp. 17-18) expressly recognized that "The Supreme Court has recently held [in the *Scharton* case] that under existing laws the offense of attempting to defeat and evade income taxes does not necessarily involve the defrauding, or attempting to defraud the United States, fraud not being an essential ingredient of such offense. . . ." Thus there was legislative awareness of the judicial construction of the suspension, and Congress enacted language deliberately framed to remove the basis for that construction where, but only where, offenses against the revenue laws were involved. No such amendatory language was enacted in the 1942 Suspension Act, which therefore should be interpreted in line with the *Noveck*, *McElvain* and *Scharton* cases, with respect to conspiracy and substantive counts alike.

3. Independently of the foregoing, the Suspension Act is applicable only to frauds which are pecuniary in nature, or which arise out of and are connected with the War.

The Suspension Act is inapplicable to this indictment, for reasons quite independent of those above. The limited purpose of the Suspension Act, and the necessity of preventing its application from swallowing up the statute of limitations, have given rise to the rule that the Suspension Act covers only pecuniary frauds. Obviously, the offenses charged in this indictment are not of that character.

In *United States* v. *Cohn*, 270 U. S. 339, this Court, in construing the so-called "False Claims Act" (18 U. S. C. [old] 80) prior to its amendment in 1934 (48 Stat. 996), declared (at pp. 346-347) that the "usual and primary sense" of the word "defrauding" meant "cheating the Government out of property or money." This Court declined to give

"defrauding" in that context its broader "secondary" meaning—"interfering with or obstructing . . . lawful governmental functions by deceitful and fraudulent means"—except as a result of the 1934 broadening amendment. *United States* v. *Gilliland*, 312 U. S. 86; *cf. Haas* v. *Henkel*, 216 U. S. 462.

The question is, therefore, whether there is anything in the context or legislative history of the Wartime Suspension Act which warrants interpreting the words "fraud or attempted fraud" other than in their "usual and primary sense" of pecuniary fraud. The answer is clearly in the negative. The language of the Suspension Act is narrower than that of Section 37 of the Criminal Code, which was broadly construed in *Haas* v. *Henkel, supra*.[25] The legislative history, as manifested in the House and Senate committee reports on the Suspension Act (Appendix, pp. 11-17), makes it clear that Congress had pecuniary frauds exclusively in mind. Immediately after stating the purpose of the legislation (to suspend the statute of limitations applicable to offenses involving the defrauding of the United States), the reports state: "Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill." After discussing the problems faced by the Department of Justice, and the need to give it more time to investigate and gather evidence of frauds against the Government, the reports state:

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[25]Section 37 of the Criminal Code (Appendix, p. 1) covers the defrauding of the United States "for any purpose", indicating that the purpose need not be pecuniary. This language is omitted from the 1942 Suspension Act, as well as from the 1921 and 1926 provisos.

> "The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws."

The legislative history of the tatute (Act of December 27, 1927, c. 6, 45 Stat. 51) which repealed the 1921 suspending proviso is even clearer. The House Report (H. R. Rep. 16, 70th Cong., 1st Sess.) stated, "In 1921 the Attorney General represented that he was desirous of having further time to investigate alleged war frauds". The sponsor of the repealing legislation in the House, Mr. LaGuardia, stated on the floor (69 Cong. Rec. 842) that the 1921 suspending proviso "was intended to apply only to war frauds . . . The war frauds are cleaned up by this time . . . If anyone has defrauded the Government in cases arising out of the war, if he has not already been indicted, there is not much chance of indicting him now."

In *Marzani v. United States*, 168 F. 2d 133 (D. C. Cir.), twice affirmed by an equally divided Court, 335 U. S. 895 and 336 U. S. 922, it was held that the 1942 Suspension Act "does not apply to offenses in which defrauding the United States in a pecuniary way is not an essential ingredient"

(168 F. 2d at 136), and therefore did not cover an indictment under the amended False Claims Act for making false statements to Government agencies with respect to Communist membership. The Court of Appeals thus rested its decision specifically upon the ground that the Surspension Act applies only to pecuniary frauds.[26] So far as we are aware, the question was never tested under the 1921 proviso. However, in every reported case in which the 1921 statute was held applicable, the fraud charged was clearly within the "usual and primary sense" defined in the *Cohn* case—*i.e.*, the purpose was to defraud the Government of money or property. *Miller* v. *United States*, 24 F. 2d 353 (2d Cir.); *Falter* v. *United States*, 23 F. 2d 420 (2d Cir.); *Weinhandler* v. *United States*, 20 F. 2d 359 (2d Cir.); *Bailey* v. *United States*, 13 F. 2d 325 (9th Cir.); *Evans* v. *United States*, 11 F. 2d 37 (4th Cir.).

Indeed, we know of only one decision under any of the suspension statutes embodying the language here in question where fraud in the "secondary sense" of the *Cohn* case has been held covered by the suspension. *United States* v. *Gottfried*, 165 F. 2d 360 (2d Cir.), certiorari denied, 333 U. S. 860. In that case, the defendants were indicted under the False Claims Act for false statements to the Office of Price Administration to circumvent wartime sugar rationing, and for conspiracy to defraud the United States by means of the false statements and the bribery of one of its officers. The court rejected the argument, based on the legislative history, that the Suspension Act should be confined to frauds involving pecuniary loss to the Govern-

[26]The court rested its decision on an analysis of the *Noveck*, *McElvain*, *Scharton* and *Gilliland* cases rather than on the legislative history of the Suspension Act.

ment, observing, however, that (at 368) "the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar."

The *Gottfried* case affords no basis for holding the Suspension Act applicable to the present case, since it is clear that the indictment here fails to meet Judge Hand's test of the "hurly-burly of war". There is, therefore, no need to determine here whether or not the *Gottfried* case, insofar as it departs from the *Marzani* requirement of *pecuniary* fraud, was rightly decided.[27] It may be argued

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[27] Judge Hand's opinion referred to the opinion in *Haas* v. *Henkel*, 216 U. S. 462, which held that Section 37 covers conduct "calculated to obstruct or impair" government operations (although footnote 20 of his opinion refers to the section of the U. S. Code embodying the False Claims Act rather than Section 37), and then states (p. 368): "We see no reason for reading the words 'defrauding the United States' in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress". But it had already been stated in the *McElvain* case (272 U. S. at 639) that "The language of the [1921] proviso cannot reasonably be read to include all conspiracies defined by Section 37", and the language of the 1921 proviso was thereafter carried into the 1942 Suspension Act without significant change, *supra*, pp. 23-24, 28.

Furthermore, no question of limitations was presented by the conspiracy (Section 37) indictment in the *Gottfried* case. The indictment which was there asserted to be barred by limitations was one for the substantative offense of violating the False Claims Act. An earlier decision of the Court of Appeals for the Second Circuit held that fraud is not an essential element under the latter statute: *United States* v. *Tommasello*, 160 F. 2d 348 (2d Cir.), *infra*, p. 37. The authority of the *Gottfried* case seems to have been questioned in *United States* v. *Obermeier*, 186 F. 2d 243, 257 footnote 64 (2nd Cir.): "In *United States* v. *Gilliland*, 312 U. S. 86, the offense was so defined as to make fraud an ingredient. So, too, in *Gottfried* v. *United States*, 165 F. 2d 360 (2d Cir.) as we there interpreted the statute creating the crime". Judge Learned Hand was again on the bench in the *Obermeier* case, wherein the opinion was written by Judge Frank.

that special wartime legislation such as price controls and food rationing—enacted and enforced as part of "the hurly-burly of war"[28]—are in that respect like wartime contracts and purchases. But such a result would provide no basis for holding the Suspension Act applicable here.

4. The Suspension Act does not apply to any of the counts of this indictment.

It must be apparent from what has been said so far that Counts I (conspiracy) and II (the substantive offense which was the object of the conspiracy) of this indictment[29] are barred by the statute of limitations unless the offense charged in Count II meets the requirements of the wording, purpose, and settled judicial construction of the Suspension Act. This is one of those instances where elaboration risks obscuring the obvious. The Suspension Act is so clearly inapplicable to Count II that the Court of Appeals for the Second Circuit (Judges Frank, Learned Hand and Swan), in a similar case under the identical statute (8 U. S. C. 746(a)(1)) on which Count II is based, disposed of the point in precisely three sentences.

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[28]Judge Hand speaks of crimes "committed in the hurly-burly of war", but it seems perfectly clear that he means crimes which are related to or part of the "hurly-burly" rather than all crimes committed *during* the "hurly-burly". For the very problem is to distinguish, with respect to the application of the Suspension Act, among all crimes committed *during* the "hurly-burly", and the phrase can therefore have meaning only with respect to crimes *arising out of* the "hurly-burly". See the concurring opinion of Mr. Justice Clark in *United States* v. *Smith*, 342 U. S. 225, 230-31; *United States* v. *Shoecalter*, 103 F. Supp. 806, 809 (N. D. Cal.). In *United States* v. *Mathues*, 27 F. 2d 137 (E. D. Pa.), speaking of the 1921 suspending proviso, the court stated (at 138): "Incidentally this was aimed at war frauds".

[29]The application of the Suspension Act to Count III is discussed *infra*, pp. 38-40.

In so doing, they said all that is necessary on the subject. *United States* v. *Obermeier*, 186 F. 2d 243, 256-57 (2d Cir.), certiorari denied 340 U. S. 951:

> "That [the Wartime Suspension] Act, so far as is pertinent, is substantially the same as the Acts interpreted by the Supreme Court in *United States* v. *Noveck*, *United States* v. *McElvain*, and *United States* v. *Scharton*. As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense,' and does not; absent such a statutory definition, apply to perjury or false swearing; even when the United States is directly interested. Nothing in 8 U. S. C. A. Sec. 746(a)(1), under which defendant was indicted, makes fraud an ingredient of the crime."

We have no desire to belabor the point, but a brief summarization may be useful, in order to show that Count II meets neither of the requirements, each of which is independently necessary, for applicability of the Suspension Act.

(a) Fraud is not an element of the statutory crime charged. This is patent on the face of the statute. To charge and prove the offense, the Government need neither charge nor prove fraud. *United States* v. *Noveck*, *supra*; *United States* v. *Obermeier*, *supra*; *United States* v. *Anzalone*, 197 F. 2d 714 (3d Cir.); *United States* v. *Grainger*, N. D. Cal., December 5, 1952, probable jurisdiction noted, April 6, 1953, Docket No. 634. It need only prove that a false statement was knowingly made,[30] and any allegation or

[30]And, by judicial construction, that the falsehood was material. *Rein* v. *United States*, 69 F. 2d 206 (3rd Cir.); *United States* v. *Bressi*, 208 Fed. 369 (W. D. Wash.).

proof of fraud is surplusage. *Holmgren* v. *United States*, 156 Fed. 439 (9th Cir.). Assuming that fraud was an incident or even the purpose of the false statement, that is no more governing here than it was in the *Noveck* case. See *Falter* v. *United States*, 23 F. 2d 420, 426 (2d Cir.). Equally, it is clear that false statements can be knowingly made in naturalization proceedings without any intent to defraud the government. Finally, the statute does not "denominate" the crime as involving fraud. *United States* v. *Scharton*, *supra*.

(b) There is charged no intent to defraud the Government of property or money, within the "usual and primary sense" of the word "defraud". *United States* v. *Cohn*, *supra*; *Marzani* v. *United States*, *supra*; cf. *United States* v. *Beacon Brass Co. Inc.*, 344 U. S. 43.[31] The crime charged does not in any way "arise out of the war effort" and "had nothing to do with the war or the reconversion thereafter". See the opinion of Mr. Justice Clark, concurring, in *United States* v. *Smith*, 342 U. S. 225, 230-31. It is most certainly and totally unrelated to the "hurly-burly of war" described in the *Gottfried* case. The federal statutes relating to naturalization, including the criminal provisions, are permanent legislation unrelated to the war emergency.[32]

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[31]Referring to the statute involved in the *Marzani* case (the False Claims Act), this Court, *per* Mr. Justice Minton, stated in the *Beacon Brass* case (344 U. S. at 45): "Obviously, at the times of the indictments here, the three-year limitation period, 18 U. S. C. (Supp. V) Sec. 3282, for violations of this statute had expired as to statements made in October 1945."

[32]If it be deemed relevant, this very case is equally unrelated. The issue with respect to Bridges' membership in the Communist Party had been in the forefront of the Government's "awareness" since long before the war, and was in no sense a matter which the Department of Justice needed more time to discover. Accordingly, this is clearly the type of case which the Suspension Act was *not* intended to reach.

The rule that the offense of making false statements to the Government does not embody fraud as an essential element, unless the statute clearly so requires, is by no means confined to naturalization cases. *United States* v. *Tommasello*, 160 F. 2d 348 (2d Cir.); *Walker* v. *United States*, 192 F. 2d 47 (10th Cir.); *cf. Wesson* v. *United States*, 164 F. 2d 50 (8th Cir.). In the *Tommasello* case, the defendant was indicted for writing a false prescription for morphine "with intent to defraud the United States". The defendant pleaded lack of intent to defraud, but the court (speaking through Judge Augustus Hand) ruled (p. 350) that under the False Claims Act (18 U. S. C. 80) "it is only necessary to prove that the defendant made false statements or representations in his prescription in respect to the patient who was to use the morphine but it is not necessary to show that the United States was defrauded."

Finally, any other conclusion would be clearly contrary to Congressional intent. After this Court held in the *Scharton* case that the offense of evading or defeating income taxes did not involve the element of fraud and consequently lay outside the 1926 proviso to the Revenue Act, Congress showed that it knows how to carve out a specific area where the longer period of limitation shall apply, even though the fraud is not an element of the offense. The 1932 amendment to the Revenue Act was expressly intended to accomplish just that.[33] The Government is now asking this Court to construe the Suspension Act as if Congress had enacted a similar broadening amendment in the naturalization field.

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[33] The 1932 amendment extended the coverage of the six-year period both to the substantive offense of willfully defeating or evading taxes (*Scharton*) and to conspiracies under Section 37 having that offense as their object (*McElvain*). Appendix pp. 5-6.

Since Count II is clearly barred, so is Count I. Count I charges a conspiracy of which the offense stated in Count II is the object. If fraud is not an element of the false statement, it cannot be an element of the conspiracy. *United States* v. *McElvain, supra; Braverman* v. *United States, supra.*

The same reasoning applies to Count III, which charges petitioners Robertson and Schmidt, under 8 U. S. C. 746(a)(5)a, with aiding Bridges to obtain a certificate of naturalization, knowing it to have been procured by fraud. But Count III alleges only that the fraud consisted of the false statement charged in Count II and, as has been shown, fraud was not an element of the false statement offense. No more can it be an element of the "assisting" offense.

It is noteworthy that the clause on which Count III is based is immediately followed by 8 U. S. C. 746(a)(5)b, which covers certificates known to have been procured by means of a false statement. The careful distinction drawn by Congress between clauses a and b, incidentally, shows once again that when Congress wishes to distinguish between fraud and falsity,[34] it has no difficulty in finding appropriate language. But since the false statement offense (Count II) upon which this indictment rests does not embody the element of fraud, the Government cannot salvage it either

[34] This Court has equally carefully drawn the distinction. Compare *Knauer* v. *United States*, 328 U. S. 654 with *Schwinn* v. *United States*, 311 U. S. 616. In the latter case, the court below had held that a falsehood respecting a matter of fact was "fraud" within the meaning of the denaturalization statute (112 F. 2d 74). This Court on certiorari entered the following *per curiam* order: "The petition for writ of certiorari is granted. The judgment is affirmed on the sole ground that the certificate of citizenship was illegally procured". Since a denial of certiorari would have achieved the same practical result, and would have given no greater authority to the lower court's "fraud" holding, this Court's action in granting the writ and simultaneously specifying the ground of its affirmance seems to indicate a purpose to make it clear that a false statement as to a past fact does not necessarily involve the element of fraud.

by using the "fraud" clause of Section 37 in Count I or of 8 U. S. C. 746(a)(5) in Count III. Neither in Count I nor in Count III do the facts alleged carry us beyond falsity and into fraud, and neither count is covered by the Suspension Act.

In thus clinging to the mere presence of the word "fraud" in these statutes, the Government overlooks that the Suspension Act requires not the mere word but that the offense embrace fraud as an essential element.[35] And it is plain that the Government included the conspiracy count in this indictment solely to assist its struggle to bring the indictment within the Suspension Act. For the acts alleged in Count I as constituting a conspiracy, comprise only the acts alleged in the subsequent substantive counts, including the formal steps in the naturalization proceeding.[36] The hollow quality of the conspiracy charge is revealed by the fact that Robertson's participation was the wholly accidental result of the fact that one of the two prospective witnesses who accompanied Bridges to the naturalization proceeding

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[35]Compare *United States* v. *Champlin Refining Co.*, 341 U. S. 290, which found different meanings for the same phrase in various parts of the same statute.

[36]In *Bridges* v. *United States*, pending, Docket No. 549 (the companion case to the one at bar), the Government, at page 7 of its memorandum admits,

> "While this count charges a conspiracy to defraud the United States under 18 U. S. C. [1946 ed.] 88, which obviously is not part of the Nationality Act of 1940, nevertheless, the illegality of the conspiracy is predicated on a contravention of the statutory mandate of the Nationality Act. That Act prescribes the steps for obtaining naturalization in explicit terms."

Cf. Gebardi v. *United States*, 287 U. S. 112, 122: ". . . where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, [citing state cases] or under the federal statute [citing federal cases]." See also *United States* v. *Katz*, 271 U. S. 354; *United States* v. *Zeuli*, 137 F. 2d 845 (2d Cir.). In the present case, the naturalization laws required that Bridges' petition for naturalization be supported by two witnesses; the particular substantive offense alleged in Count II could not have been committed without meeting this preliminary requirement.

could not satisfactorily establish his citizenship qualifications (Tr. 459-61). On such ephemeral footing the Government's effort to invoke the Suspension Act rests.

5. The arguments of the Government have all been previously rejected by this Court.

There is a nostalgic—one might even say shopworn—quality to the Government arguments made and accepted below, and re-offered here, for each of them has been made before and rejected by this Court. The arguments are, essentially, these:

(a) It is emphasized that Counts I and III are laid under statutes which contain the word "fraud" in the statement of the offense. "Manifestly" this meets the test of the Suspension Act, particularly because the *Noveck* case cited 271 U. S. at 204) Section 37 as an illustration of a statute to which the Suspension Act might be applicable (Government memorandum on certiorari, p. 18).

But in the *McElvain* case the indictment was brought under Section 37. The Government brief in that case quoted (at p. 15) the same sentence from the *Noveck* case, and the Government's argument consisted of the single sentence: "Section 37 is the section involved in this case." The *McElvain* case rejected this argument, and held explicitly that the Suspension Act does not reach all conspiracies covered by Section 37, even though the indictment utilizes the "fraud" language of that section.

(b) The second Government argument is that the vital word of the Suspension Act is "involved", from which it is said to follow that there need be no precise relationship between the fraud and the offense: "some relationship be-

tween the offense and the fraud will suffice" (Government brief below, p. 108). Twenty-five years ago, in the *Noveck* case, the Government constructed an elaborate argument based upon the word "involved", with several dictionary definitions (Government brief in the *Noveck* case, pp. 10-11). The argument failed there, as it must here.

(c) The central theme of the third Government argument is that the conduct charged against the defendants necessarily *results* in a fraud against the United States (Government brief below, p. 108). So, too, in the *Noveck* case, the Government argued that "the defrauding of the United States was the necessary and logical consequence of Noveck's perjury" (Government brief in the *Noveck* case, p. 12; see 271 U. S. at 203). And in the *Scharton* case, the Government argued that any attempt to evade taxes by craft or trickery was "fraud" because it deprived the Government of money (Government brief in the *Scharton* case, p. 8; see 285 U. S. at 520).

These arguments of "necessary consequence" failed, not because the assertions were not factually true, but because they were irrelevant. The issue was not whether fraud results from conduct, or is the purpose of conduct, but whether the fraud must be proved as a basis of criminal conviction for the conduct.

(d) Last comes the argument from *Haas* v. *Henkel*, 216 U. S. 462, a case having nothing to do with the Suspension Act, but holding that fraud in Section 37 covers any attempt to obstruct or defeat the lawful functions of the Government. Hence, runs the argument, "fraud" in the Suspension Act must be construed to cover all such attempts (Government brief below, pp. 113-114; memorandum on certiorari, p. 21).

But this argument was also relied on by the Government in the *Scharton* case (Government brief in the *Scharton* case, p. 7), and unsuccessfully. And this Court has repeatedly ruled that a conspiracy falls within the suspension acts only if the offense which is the object of the conspiracy lies within their scope.

6. If the Suspension Act were interpreted as is urged by the Government, the basic policies of both the statute of limitations and the Suspension Act would be subverted.

When Congress was considering the 1942 and 1921 legislation extending the statute of limitations, the basic problem it faced was how far it should go in making an exception to the beneficial and established policy of repose underlying the statute of limitations. The language which it adopted in the suspension acts, and the committee reports, indicate that Congress intended to draw a line which would give the Department of Justice additional leeway in circumstances where leeway is needed. Equally clearly, Congress intended to preserve the statute of limitations, and the policy of repose, except where the war emergency required their relaxation.

It is also to be noted that, whereas the 1921 Act was a proviso, intended to be temporary and in fact repealed in 1927 (45 Stat. 51), the 1942 Suspension Act (like the 1926 and 1932 amendments to the Revenue Act) is permanent legislation, and the 1942 Suspension Act comes into play, "When the United States is at war. . . ." Contrary to the suggestion of the court below,[37] this makes it all the more

[37] 199 F. 2d at 825 footnote 15a: "We think the fact that the Suspension Act is cast in a separate independent Act rather than as a proviso to the general statute of limitations and is cast in very in-

important that the 1942 Act be not applied so as to subvert the general statute of limitations.

In specific legislative fields where Congress has desired to broaden the scope of the suspension it has done so, as in the 1932 amendments to the Revenue Act.[38] Thus, in 1942 and upon the recommendation of the Secretaries of War and Navy and the Attorney General (Sen. Rep. 1592, 77th Cong., 2nd Sess.), Congress enacted a law (56 Stat. 781) suspending the statute of limitations with respect to anti-trust suits, both civil and criminal. But the Department of Justice never requested, and Congress has never enacted, legislation to broaden the effect of the Suspension Act as applied to the naturalization laws by eliminating fraud as a necessary element,[39] and the Government should not now ask this Court to do what Congress has neither done nor been asked to do.

It should also be borne in mind that the 1942 Act results in a *long* period of limitation—at a minimum the seven-year period from the effective date of the Act to December 31,

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clusive language indicates that Congress intended to avoid the limitations written into the Noveck, McElvain and Scharton opinions." But in fact (a) the 1942 language is no more inclusive than that of 1921, (b) there is literally nothing in the legislative history in support of the suggested broadening intention, and (c) the re-enactment of the identical language, following the judicial construction, clearly shows the contrary.

[38] *Supra*, p. 37.

[39] However, on June 30, 1951 the President approved, as Public Law 65 of the 82nd Cong., H. R. 2396, which fixed at 10 years the period of limitations for the naturalization offenses in 18 U. S. C. 1423 to 1428 and 1541 to 1544 inclusive, and conspiracies to commit these offenses. These sections do not include the one on which Count II of this indictment is based, but they do include the one upon which Count III is based (18 U. S. C. 1425).

1949—and an even longer period if the Government's current position, that the statute does not *start* to run until December 31, 1949, should prevail.[40] On that basis, and accepting the Government's argument that the now-repealed five-year statute of limitations for crimes under the Nationality Act is preserved for all offenses committed prior to September, 1948,[41] such offenses committed in 1942 could be made the subject of an indictment until December 31, 1954.[42] And, inasmuch as offenses under the revenue laws are not expressly excluded from the 1942 Suspension Act (whereas they were so excluded from the general statute of limitations to which the 1921 suspension, construed in the *McElvain* case, was a proviso), offenses under the revenue laws involving defrauding the Government, which are governed by a six-year statute of limitations (26 U. S. C. 3748), could be prosecuted until December 31, 1955—thirteen years after the 1942 Act, and *nine years* after the President's proclamation of the end of hostilities.

Another aspect of the Government's position in this case gives even greater cause for alarm. This is its effort to make the Suspension Act co-extensive with Section 37 of the Criminal Code. Since the decision in *Haas* v. *Henkel*, 216 U. S. 462, Section 37 has been given an everbroaden-

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[40]See the Government's petition for certiorari in *United States* v. *Klinger*, Cert. granted, April 6, 1953, Docket No. 527, and the concurring opinion of Mr. Justice Clark in *United States* v. *Smith*, 342 U. S. 225, 230-31.

[41]See the Government's memorandum on certiorari in this case, pp. 23-26, and *infra*, pp. 48-52.

[42]If the ten-year period of Public Law 65 (*supra*, footnote 39) had been in effect at the time, prosecution for offenses within its coverage could be prosecuted until December 31, 1959.

ing construction. See *Falter* v. *United States*, 23 F. 2d 420, 423-424 (2d Cir.). This Court had earlier declared that its reach transcends that of a conspiracy to defraud at common law. *United States* v. *Keitel*, 211 U. S. 370, 393. Section 37 has been said to reach any act which hampers or interferes with the United States in the successful execution of any policy established pursuant to law. *United States* v. *Soeder*, 10 F. Supp. 944 (W. D. Mo.); see also *Outlaw* v. *United States*, 81 F. 2d 805, 807 (5th Cir.); *Cendagarda* v. *United States*, 64 F. 2d 182 (10th Cir.); *cf. Biskind* v. *United States*, 281 Fed. 47 (6th Cir.) (conspiracy, for same conduct as the *Cendagarda* case held within "fraud clause" of Section 37, here held within its "offense against the United States" clause). Members of this Court and other federal judges have had occasion to comment on the "serious threat to fairness in our administration of justice" involved in the Government's growing and pervasive reliance on conspiracy charges. See the concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 445, in which are quoted earlier statements to the same effect by Chief Justice Taft and Judge Learned Hand.

In short, if this Court were now to depart from the solid ground of the *Noveck*, *McElvain*, and *Scharton* cases, the result would be to sweep a very large amount of the federal criminal jurisdiction, particularly where conspiracy is charged, under the Suspension Act. We mean this quite literally, and examination of the various categories of federal criminal cases bears out that conclusion. Under the position taken by the Government, it is hard to conceive

that any of these categories[43] are outside the scope of the Suspension Act if any element of falsity can be alleged, or if a conspiracy count in the language of the "fraud clause" of Section 37 is included in the indictment.[44] See, for example, *United States* v. *Terranova*, 7 F. Supp. 989 (N. D. Cal.), holding that a conspiracy to pay less than prevailing wages was "fraud" within the meaning of Section 37. The Government's rationale enables it, by utilizing a conspiracy charge, to "increase the statute of limitations

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[43]See the breakdown into categories in Annual Report of the Director of the Administrative Office of the United States Courts (1952), pp. 96-97:

Criminal cases commenced in 86 districts for certain types of cases

Nature of Offense	1942	1948	1949	1950	1951	1952
Total	30,577	30,102	32,303	33,739	36,322	35,666
Transportation, etc., of stolen motor vehicles	1,876	3,189	2,834	2,772	2,556	3,106
Fraud and other theft	3,981	8,315	8,756	8,892	7,128	7,268
White slave traffic	441	264	190	233	227	229
Narcotics	1,945	1,502	1,578	2,172	1,982	1,873
Liquor, Internal Revenue	9,591	3,008	3,403	3,696	3,968	3,764
Food and Drug Act	371	429	356	363	365	269
Immigration laws	2,157	7,845	9,838	10,451	14,931	13,114
Juvenile delinquency	955	1,010	868	968	1,005	1,115
Migratory bird laws	620	501	745	525	498	483
National Defense laws:						
Selective Service Act—1940	3,356	459	185	164	22	11
Selective Service Act—1948	—	—	158	44	314	660
OPA-OHE, price and rent control	—	234	33	7	—	2
Defense Production Act of 1950	—	—	—	—	—	108
Alien registration	720	2	1	1	30	53
Kidnapping	19	27	21	23	23	34
All other	4,545	3,317	3,337	3,423	3,273	3,577

[44]Unless the defendant's conduct is open rather than covert. *Hammerschmidt* v. *United States*, 265 U. S. 182.

and, in effect, hold the defendant for crimes which already had been outlawed." (*In re Doyle*, 42 F. 2686 at 691).[45]

To avoid these excesses,[46] this Court and the lower federal courts have uniformly interpreted the Suspension Act so as to achieve the Congressional purpose without opening the door to wholesale evasion of the three-year statute of limitations. This case should not be made the occasion for

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[45]A sampling of cases in the Southern District of New York where the indictment contained a conspiracy count and where the proceedings against one or more of the defendants terminated in federal year 1951, reveals the breadth of the conspiracy "to defraud" language of the Criminal Code. Indictments laid in terms of conspiracy to defraud the United States included such diverse matters as perjury before a grand jury (*United States* v. *Brothman*, 133/106), forgery (*United States* v. *Campbell*, 133/270), and interfering with the administration of the revenue laws (*United States* v. *Comenetz*, 134/127). Other indictments involving violation of the liquor laws sometimes did (*United States* v. *Jaffe*, 133/334) and sometimes did not (*United States* v. *Tavolacci*, 134/301) contain the term "intent to defraud", although the violations were similar. Had there been a reason for so doing, many of the indictments phrased simply in terms of a conspiracy to violate specific penal provisions could have been rephrased in terms of conspiracy to defraud the United States, *e.g.* violations of the narcotics laws (*United States* v. *Kouchalakos*, 133/46), and unlawful use of passport (*United States* v. *Hinchliffe*, 135/40).

[46]The principle of the *Noveck*, *McElvain* and *Scharton* cases leaves ample leeway to the Government within the purposes of the Suspension Act. A necessarily hasty check of the Criminal Code discloses many sections involving the type of fraud envisaged in the Committee Reports on the 1942 Suspension Act; *e.g.*, possessing or using, with intent to defraud the United States, forged, altered or counterfeited contracts, deeds, powers of attorney, certificates, orders or other writings in order to obtain money from the United States (Secs. 495, 1002); altering, forging or counterfeiting contracting bonds, bids, contracts or public records with intent to defraud the United States (Sec. 494); making false entries, statements or reports to Federal credit or lending institutions with an intent to defraud the United States or its agencies (Sec. 1006); improperly delivering certificates, vouchers or receipts for military or naval property with an intent to defraud the United States (Sec. 1022); delivering insufficient money or property for military or naval services with an intent to defraud the United States (Sec. 1023); and the keeping or making of false entries or accounts by any employee of the United States with an intent to defraud (Sec. 2073).

departing from the sound principles enunciated by this Court through Mr. Justice Butler in the *Noveck* and *McElvain* cases, Mr. Justice Roberts in the *Scharton* case, and Chief Justice Stone in the *Braverman* case.

In the light of its history, there is not the slightest reason why the Government should be allowed to bring this suit after the expiration of the normal period of limitations.[47] Baron Alderson observed in *Queen* v. *Robins*, 1 Cox C. C. 114 (1844), where the indictment followed the act by only 21 months, that "it is monstrous to put a man on his trial after such a lapse of time." There is here no lack of harmony between legal principles and general equities.

B. Counts II and III are Governed by the General Three-Year Statute of Limitations, and not by the Special Five-Year Statute of the Nationality Act, which was Repealed in 1948.

Below and in its memorandum on certiorari (pp. 23-26), the Government contended that Counts II and III[48] are governed, not by the general three-year statute of limitations, but by the five-year statute (8 U. S. C. [1946 ed.] 746(g), Appendix pp. 2-3) formerly incorporated in the Nationality Act.

The Act of June 25, 1948 (62 Stat. 683) which enacted the present Criminal Code (Title 18 U. S. C.) into positive law effective September 1, 1948, repealed this five-year stat-

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[47] *Cf. United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 308 wherein ("coming to this Court as it does more than twenty years after the ships were completed") it is implicit that the Government should not postpone, until long after a war is over, its enforcement activities.

[48] This argument has no application to Count I of the indictment.

ute and fixed the period of limitations at three years (18 U. S. C. 3282). Section 21 of the Act of June 25, 1948, *supra*, provided that "Any rights or liabilities now existing" under the repealed laws "shall not be affected by this repeal."

The precise question is whether an indictment returned after September 1, 1948 (as was the indictment here) for a crime committed before that date is governed by the five-year or the three-year period.

The court below, after considering and reconsidering the Government's argument,[49] unanimously rejected it and held the three-year period applicable. 199 F. 2d at 819-820. The same contention was made by the Government, and unanimously rejected (by Judges Frank, Learned Hand and Swan) in *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir.)

Judge Frank's opinion in the *Obermeier* case (at pp. 250-256) contains a full review of the legislative history of the statutory provisions in question, and a careful analysis of the relevant principles with respect to repealers and saving clauses. There is no need to rehearse at length this history and analysis, which are so ably covered in his opinion. No court has approved the Government's position with respect to the Nationality Act, and there is little, if any, basis for it in decisions under other statutes.

Compelling evidence that the "saving clause" of the 1948 Act did not preserve the five-year statute of limitations beyond September 1, 1948 is found in well-established Congressional legislative practice. When Congress has desired to preserve the original period of limitations for

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[49] In its original opinion of September 6th, the court accepted the argument (Tr. 8225-29).

offenses committed before a change in the period, it has made express provision to this effect. This has been true for at least seventy-five years, and may be seen by comparing Sections 13 and 5598 of the revised statutes of 1874 with Section 5599 thereof. Sections 13 and 5598 preserve, respectively, "any penalty, forfeiture, or liability" and "all offenses committed and all penalties or forfeitures". Section 5599, in contrast, expressly preserves "all acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures".[50]

In 1933, when the revised statutes were overhauled and obsolete sections repealed, Section 5599 was retained at the suggestion of the Secretary of War and the Attorney General, and for the specific reason that the concluding proviso of the repealing statute under consideration "refers only to 'rights' and 'liabilities' and not to remedies, recourse to which may be barred by limitations." See Sen. Rep. 1205, 72nd Cong., 2d Sess. Accordingly, if Congress had intended to preserve the five-year statute of limitations in the Nationality Act, "it would have been so easy to have said so". *Baltimore & P. R. R. Co.* v. *Grant,* 98 U. S. 398, 403.

Furthermore, the legislative history is squarely contrary to the Government's contention. This is borne out by the "authoritative" (*United States* v. *National City Lines,* 337 U. S. 78, 81) reviser's notes to 18 U. S. C. 3282 (the three-year statute of limitations) which, specifically referring to the five-year period (8 U. S. C. [1946 ed.] 746[g]), state that this period "is reduced to three years" since "there

[50]The 1909 Criminal Code (35 Stat. 1159) contained similar distinct provisions, *e.g.*, sections 533 and 534.

seemed no sound basis for considering three years adequate in the case of heinous felonies and gross frauds against the United States, but inadequate for misuse of a passport or false statement to a naturalization examiner."

The fact that the effective date of the repealing statute was postponed until September 1, 1948, shows, as the court below put it (199 F. 2d at 820), that "The legislation was skillfully drawn to prevent the nullification of prosecutions already begun by providing for continuity of the offenses through the revision and to prevent an effective amnesty as to violations more than three and less than five years old by postponing the effective date long enough for the government to act under the old five-year limitation."

Likewise, any other construction would result in the indefensible anomaly that a later offense would be barred sooner than an earlier one. For an offense committed on August 31, 1948, the statute would not run until August 31, 1953; for the identical offense committed on the very next day, prosecution would be barred on September 1, 1951.

The cases cited by the Government (memorandum on certiorari, p. 25) accomplish little or nothing in support of its contention.[51] The Government appears to lay some store by *De La Rama S. S. Co.* v. *United States*, 344 U. S. 386, a holding that the general savings clause (1 U. S. C. 109) preserved to a suitor the right to proceed in the district court with a civil case already begun there, despite the repeal of the War Risk Insurance Act. But this decision does not reach the problem here, inasmuch as it did not deal with a limitations problem but rather with a contention

[51] The authorities mentioned to support a contrary view are either civil cases (in which the doctrine of liberal construction in favor of repose has not the same force as in criminal cases), or do not involve periods of limitations, and they are all explicable upon other grounds.

which, if accepted, would have divested the district court of jurisdiction. Furthermore, the language of the statute there in question was quite different from that of the saving clause here, and there the case had been commenced many years prior to the enactment of the repealer, which is not so here.

In the present case, everything in the history of the statute of limitations and the savings clause demonstrates that it was Congress' intention to reduce the period of limitations to three years on and after September 1, 1948. Indictments brought subsequent to that date, as was the case here, are governed by the general three-year statute of limitations.

II

THIS PROCEEDING IS BARRED BY PRIOR ADJUDICATIONS UNDER THE PRINCIPLES OF RES JUDICATA, ESTOPPEL, AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The primary and determinative factual issue raised by the indictment is whether or not Bridges had belonged to the Communist Party during the period covered by the indictment, 1933 to September 17, 1945.[52] This very issue was determined favorably to Bridges in the proceedings culminating in his naturalization on September 17, 1945. With respect to a shorter period of time, the same factual issue was the subject of the two administrative deportation proceedings against Bridges, the second of which was reviewed by this Court in *Bridges* v. *Wixon*, 326 U. S. 135 (1945).

[52]There were, of course, other factual issues with respect to petitioners Schmidt and Robertson under Counts I and III, but these were dependent upon the primary issue of Count II.

In the two prior proceedings the Government sought to prove its charge of Communist membership[53] by adducing evidence that Bridges had attended Communist meetings; had followed a position in trade union matters "parallel" to that of the Communist Party, had dealt with Communists in matters of union concern, and had admitted to membership in the Communist Party. The evidence in those proceedings—as indeed in this one—dealt primarily with events claimed to have transpired in the 1930's, most of it "clustered around" (*Knauer* v. *United States*, 328 U. S. 654, 660) the water-front strikes of 1934 and 1936.[54]

It is our position that the first administrative proceeding (before Mr. Landis and Secretary Perkins) determined for purposes of this proceeding that Bridges was not then a Communist, and that the second proceeding (before Judge Sears and Attorney-General Biddle), together with this Court's holding in the *Wixon* case, similarly determined that Bridges was not a Communist at any time between his entry into the United States (1920) and 1941 (the year of the Sears proceeding). Therefore, the factual issue with respect to membership prior to 1941 had been conclusively determined between the parties[55] (the Government and

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[53] *Supra*, p. 5.

[54] See Appendix, pp. 37-38.

[55] In *Cromwell* v. *County of Sac*, 94 U. S. 351, at 352-353, this Court set forth the distinction between "the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand" (commonly referred to as the doctrine of *res judicata*), and "its effect as an estoppel in another action between the same parties upon a different claim or cause of action" (commonly called "collateral estoppel" or "estoppel by judgment"). As to the latter, the prior judgment concludes "those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." See also *Duchess of Kingston's Case*, 20 State Trials 537, 168 Eng. Rep. 175 (1776), in which Chief Justice De Grey sets out the same distinction.

Bridges), and should have been so treated upon the trial of this case. This requires reversal of the judgments of conviction because the trial court, over timely objection by the petitioners, refused to limit the evidence to the period after 1941 (and various other earlier dates specified in other objections, Tr. 736, 816-17, 87 F. Supp. 14), refused so to limit the issue which went to the jury (Tr. 293-96), affirmatively instructed the jury to disregard the earlier determinations (Tr. 7867-68, 7877), and excluded from evidence this Court's opinion in the *Wixon* case (Tr. 4226-27).

It is also our position that the naturalization decree of September 17, 1945 conclusively determined between the parties that Bridges was not a Communist at any time during the entire period covered by the indictment. This requires reversal of the judgment and dismissal of the indictment.

Finally, it is our position that the entire course of the several litigations against Bridges, involving, as it does, repetitious charges based on the same factual issue, and harassment of an individual on the same charge but in different proceedings over the course of fourteen years,

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(n. 55 cont.) Under the doctrine of these and other cases, the prior decisions with respect to the factual issue of Bridges' membership in the Communist Party would constitute a bar to this indictment by way of collateral estoppel rather than *res judicata*. However, the distinction in terminology is not always closely observed. See *United States* v. *Balt. & Ohio R. R. Co.*, 229 U. S. 244, 253, wherein an issue determined in an equity proceeding was "properly held to be *res judicata* as to the facts averred in" a subsequent criminal indictment involving the same issue.

There is no doubt that *res judicata* and *estoppel* are doctrines which apply in criminal as well as civil proceedings. *United States* v. *Oppenheimer*, 242 U. S. 85; *Regina* v. *Miles*, L. R. 24 Q. B. D. 43. And this is true even though the first adjudication be in a civil proceeding, and is pleaded in bar in a later criminal proceeding. *United States* v. *Balt. & Ohio R. R. Co.*, *supra*.

cannot be squared with the rudiments of fair play, and is in violation of the due process clause of the Fifth Amendment. This likewise requires reversal of the judgment and dismissal of the indictment.

A. The Secretary of Labor's Determination in January, 1940 that Bridges was not a Communist Conclusively Established that Fact in this Proceeding.

On January 8, 1940, the Secretary of Labor approved the trial examiner's conclusion that the evidence failed to establish that Bridges was a member of or affiliated with the Communist Party, and dismissed the deportation proceeding (Tr. 55). It does not appear to be controverted that this determination, if made by a court, would have been conclusive in the present proceeding of the issues previously determined. The conclusive effect of the earlier proceeding would then present a routine example of collateral estoppel, and the earlier finding would "conclude those matters in issue which the verdict determined though the offenses be different". *Sealfon* v. *United States*, 332 U. S. 575, 578; *United States* v. *Balt. & Ohio R. R. Co.*, 229 U. S. 244; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1.

The court below decided (199 F. 2d at 826) and the Government contends (memorandum on certiorari, p. 14) that the Landis proceeding is not conclusive because the doctrine of *res judicata* is not applicable to deportation proceedings, more broadly, to decisions of administrative boards. The Government likewise argues that a determination of the factual issue of membership as of 1940 does not bear upon its determination as of 1945. Neither of these arguments is valid.

1. *Res judicata* and estoppel in administrative proceedings.

In denying the *res judicata* attributes of administrative determinations, the Government and the court below relied primarily on *Pearson* v. *Williams*, 202 U. S. 281 (1906), which held that a summary hearing and favorable ruling on an alien's right to enter did not bar a subsequent deportation order. But that case leads to no such broad conclusion as the Government seeks to draw; on the contrary, its reasoning tends rather to support the view that plenary, quasi-judicial determinations in deportation cases are judicially conclusive of what they decide.

The Government's position has been well described as the "all-or-none fallacy",[56] *i.e.*, the fallacy that because an administrative ruling lacking elements of judicial determination is not given the attributes of *res judicata*, no administrative decisions of whatever dignity should be so treated. However, as Mr Justice Holmes' opinion in the *Pearson* case carefully specified (202 U. S. at 284-285), the administrative decision there in question (made by a board of special inquiry of the Commissioner of Immigration) was a tentative and summary one.[57] The Board had no power to compel the attendance of witnesses, and was expected to "decide

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[56] Davis, *Administrative Law* (1951), p. 566.

[57] The Board's function was to determine, at the moment of the alien's debarkation, whether he was entitled to land. As Justice Holmes remarked, under these circumstances "any inquiry necessarily must be of a very summary sort". *Pearson* v. *Williams*, *supra*, at p. 284. See Davis, *op. cit.*, *supra*, at p. 566: "Immigration proceedings are often so hasty and summary that *res judicata* ought not to cut off opportunity to correct mistakes in the light of better understanding at a later time. Yet a slight degree of *res judicata* remains. Quite consistently with the Supreme Court's view [in the *Pearson* case], a circuit court of appeals has held that an alien should not be 'called upon again and again to prove his right to be and remain in the United States' ", citing *Choy Yuen Chan* v. *United States*, 30 F. 2d 516-517 (9th Cir.).

upon such evidence as is at hand or is readily accessible." In this context, the court stated: "Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense".

But an entirely different situation is presented when, as here, the administrative proceeding is plenary and of a quasi-judicial character. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. The court below wrongly read the *Pearson* case as a blanket holding that administrative determinations are never given the effect of *res judicata* or estoppel.[58]

Furthermore, the *Pearson* case considered the effect to be given a ruling in an entry case, not a deportation proceeding involving (as here) an alien who had long resided in this country. Deportation cases are treated, for due process and other purposes, quite differently from exclusion cases.[59] Every subsequent decision applying the *Pearson* ruling has been reached in an entry or "unassimilated status" case; it has never until this time been asserted in order to overturn a quasi-judicial administrative determina-

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[58]The nature of the misconception below is manifested by the court's observation that Dean Landis was "acting as an official of the executive department of the government but not as an arm of the judicial department . . .", 199 F. 2d at 826. True, of course, but this applies to all administrative determinations, including those which are quasi-judicial, and the court's test would have subverted the decisions in the *Tait* and *Sunshine* cases, *supra*.

[59]Compare *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, which sharply restricted the Attorney-General's powers over resident aliens, with *Shaughnessy* v. *United States ex rel Mezei*, 21 L. W. 4242, March 16, 1953, which reached the opposite result with respect to identical powers applied to an entrance case.

tion with respect to the deportability of a resident alien. Over the course of years and under this Court's influence,[60] deportation procedure has developed a progressively more formal and judicial structure. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 48-49.

As a part of this program, the administrative proceeding here in question was established. What resulted was an orderly and exhaustive hearing, resulting in a carefully deliberated finding. Had that order been made by the Tax Court, an administrative agency, it would have been *res judicata* for the year it covered. *Commissioner* v. *Sunnen*, 333 U. S. 591. Had it been made by the Court of Customs and Patent Appeals, an administrative agency, it would have been *res judicata*, at least as to the particular shipment involved. *United States* v. *Stone & Downer Co.*, 274 U. S. 225. Is this deliberate finding to be denied its consequence here because the agencies just mentioned have the word "Court" in their present titles, while Dean Landis was called a Trial Examiner and Madam Perkins was merely a Secretary? We submit that where a deportation decision as to a lawfully admitted and long-resident alien is based on exhaustive hearings, and results in a conclusion as to a past fact, that fact is conclusively determined. As the Attorney-General stated to the Senate Committee which was considering the 1940 bill to deport Bridges (Sen. Rep. 2031, 76th Cong., 3d Sess., Appendix pp. 22-23):

> "The extraordinary character of the bill upon its face is even more impressive viewed against its

[60] Meanwhile, the Immigration Service was under pressure from outside critics to develop a procedure like that of the then Board of Tax Appeals, a Board which "neither initiates or prosecutes the cases which are brought before it but in effect sits as a court." 2 National Commission on Law Observance and Enforcement No. 5, May 27, 1931, pp. 160-61.

> background. This same alien has been accused, investigated, and tried at great length, and judgment has been rendered that he had not been proved guilty of the charges made against him. By this bill, the United States would deny faith and credit to its own duly conducted legal proceedings."

Indeed, the *Pearson* case has an affirmative rather than a negative impact on the question here. The court declared (202 U. S. at 285) that the administrative ruling was of a type long "recognized as decisions of the executive department" which "cannot constitute *res judicata* in a technical sense." In what sense, then, if not technical? None of the five cases cited[61] immediately following this statement involves any question of *res judicata* in its technical sense; but they reveal the opinion's meaning. They are cases holding that exclusion or deportation orders are not subject to *review* by the courts,[62] except to determine whether due process has been denied by unfairness or lack of any supporting evidence. This in fact subsequently oc-

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[61] *Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 146 U. S. 698, 713; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305; *Japanese Immigrant Case*, 189 U. S. 86, 98; *United States* v. *Ju Toy*, 198 U. S. 253, 263. The *Ekiu* case, for example, re-affirms the right of *habeas corpus* to determine the lawfulness of an alien's restraint, while holding that Congress may give the final determination of factual issues to an executive officer who (p. 660) "is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted."

[62] These cases were cited, therefore, with respect to the *second* order in the *Pearson* case, under which the aliens were to be deported, and which they were challenging. Mr. Justice Holmes, in other words, is saying that this second order is subject to only a limited review, and that the existence of the first and tentative order admitting the alien gave the courts no basis for interfering with the second order.

curred in the present case. *Bridges* v. *Wixon*, 326 U. S. 135.

In other words, under the *Pearson* case, the Landis-Perkins determination was reviewable in the courts only on questions of due process. Now, the Government cannot turn the *Pearson* doctrine into a one-way street running in their chosen direction. Had the Landis-Perkins decision gone *against* Bridges, the Government certainly would have contended that it was subject to judicial review only as to due process; this, in fact, is just what the Government argued in the *Wixon* case (Government's brief in that case, pp. 18-23) and in *Heikkila* v. *Barber*, 21 L. W. 4249, 4250, March 16, 1953, in which this Court declared that "Congress had intended to make these administrative decisions non-reviewable to the fullest extent possible under the Constitution". But because the Landis-Perkins determination was that Bridges was *not* a Communist, the Government now claims the right to a broader judicial review (a review of factual questions),[63] by bringing an indictment for perjury.

If there are no decisions squarely establishing that a quasi-judicial determination in a deportation proceeding carries the attributes of *res judicata* and estops the parties from subsequently relitigating what has thus been determined, it is because never before, so far as we know, has the Government sought to overthrow such a determination by subsequent collateral attack. In other fields, however, there is abundant support for our position. Of course, quasi-legislative administrative actions, such as rate-making, are not *res judicata* any more than is an act of Congress.

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[63]More precisely, the same factual question except for the period of time covered, see *infra*, pp. 62-63.

Arizona Grocery v. *Atchison Ry.*, 284 U. S. 370. But that case clearly distinguishes quasi-judicial administrative decisions; the opinion states (at 389): "The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action." Nor are administrative decisions *res judicata* as to "continuing practices" such as were involved in *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149.

The *res judicata* attributes of administrative decisions were recognized in the tax field in the *Sunnen* case and in the customs field by the *Stone & Downer* case, and there are many other decisions to the same effect. *United States* v. *Wildcat*, 244 U. S. 111; *Campbell* v. *Wadsworth*, 248 U. S. 169; *United States* v. *Atkins*, 260 U. S. 220 (all dealing with Indian Affairs); *Keogh* v. *Chicago and Northwestern Ry. Co.*, 260 U. S. 156 (Interstate Commerce Commission); *United States ex rel. Girard* v. *Helvering*, 301 U. S. 540 (Board of Tax Appeals); *International Building Co.* v. *United States*, 199 F. 2d 12 (8th Cir.) (Board of Tax Appeals); *United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (7th Cir.) (Federal Trade Commission); *Lee* v. *Federal Trade Commission*, 113 F. 2d 583 (8th Cir.);[64] *cf.* *Hutton* v. *Ras Steam Shipping Co.*, 1 K. B. 834 (1907); *Mortimer* v. *The South Wales Ry. Co.*, 1 E. & E. 374 (Q. B. 1859); *Hoystod* v. *Commissioner of Taxation*, 42 T. L. R. 207 (Privy Council 1925); Spenser Bower, *Res Judicata* (1924), Ch. II, Sec. 1, No. 17. There is, in short, no basis in reason or precedent for denying that the Landis-Perkins decision conclusively determined the factual question which

[64]The *Tait* and *Louisville* cases and the *Sunshine* case (*supra*, p. 57) recognized the *res judicata* attributes of decisions of the Interstate Commerce Commission and the Bituminous Coal Commission.

was there put in issue—to wit, whether or not Bridges was then a Communist.

2. Because the Secretary of Labor's determination was not given effect in this proceeding, the judgment below must be reversed.

Apart from the *Pearson* case, the Government denies that the Landis-Perkins determination should be given effect in this proceeding because the indictment covers a different period of time. In its memorandum on certiorari (pp. 14-15), the Government states: "At most, what was decided in the prior proceedings was that Bridges had not been shown to be a member of the Communist Party before 1940. The issue as of 1945 when Bridges swore that he was not a member, was, of course, not at all involved in these proceedings. Thus the Government did not attempt to re-litigate any issue actually decided in the deportation hearings".

But part of the issue which went to the jury was the same issue that had been litigated before. If "what was decided in the prior proceedings was that Bridges had not been shown to be a member of the Communist Party before 1940", then obviously "the issue as of 1945", which alone should have gone to the jury, was whether Bridges was at any time a Communist after the decision in 1940 and before September 17, 1945 (the end of the period specified in the indictment).

However, the indictment was not so limited, and the efforts of the defense to limit the evidence and the issue for the jury were unsuccessful. The Government's memorandum completely fails to meet this basic point. As we have already pointed out (*supra*, p. 54), the court overruled objections to evidence bearing on the period prior to 1940,

refused to limit the issue which went to the jury, and affirmatively instructed the jury to disregard the Landis-Perkins determination.

It is unnecessary to decide whether the Landis-Perkins determination relates only to the point of time at which it was made, or covers the preceding years.[65] Actually, none of the witnesses who appeared before Mr. Landis gave testimony relating to the time at which the hearing was held; for the most part their testimony covered the years 1934 to 1937,[66] and the Government relied on the presumption of a continuing state of facts to establish membership as of the time of the hearing. The theory of the Landis-Perkins finding, therefore, was that Bridges had not been shown to be a Communist during the years to which the testimony related, which destroyed the basis for the presumption.

But whether the decision reaches properly only to the time at which it was made, or covers the earlier years, makes no difference here. The trial court refused to give it effect even with respect to the time at which it was rendered, and this clearly requires reversal of the judgment of conviction.

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[65]The trial examiner's finding, approved by the Secretary of Labor, related, if read literally, only to the time at which the decision was made, in accordance with the language of the charge against Bridges. Mr. Landis' report did not advert expressly to this question, although, in discussing *Kessler* v. *Strecker*, 307 U. S. 22, he observed that: "The *Strecker* case left uncertain the particular time as of which the facts of membership, etc., have to be proved, though the inference derivable from the opinion is that the significant time is that of the issuance of the warrant of arrest." See *In the Matter of Harry R. Bridges—Findings and Conclusions of the Trial Examiner* (United States Government Printing Office, 1939) p. 6, n. 17.

[66]See Appendix, pp. 36-37. The testimony of Bridges himself, who was called as a witness by the Government and of the witness Humphreys, extended into the year 1938.

B. The Decision of this Court in *Bridges* v. *Wixon* Conclusively Established in this Proceeding that Bridges was not a Communist Prior to 1941.

On September 26, 1941, Presiding Inspector Sears submitted his memorandum and proposed findings, including the findings that Bridges had been a member of and affiliated with the Communist Party. As is set forth in this Court's opinion in *Bridges* v. *Wixon*, 326 U. S. 135, 139-140, the Board of Immigration Appeals found that Bridges had not been a member of or affiliated with the Communist Party, after which the Attorney General reviewed the Board's decision and made findings in accordance with those proposed by Judge Sears. Upon issuance of a deportation warrant, Bridges challenged the legality of his detention by *habeas corpus* and the proceedings on the writ culminated in the decision of this Court in the *Wixon* case. As a result of that decision the writ was granted, Bridges was released from bail, and the deportation proceeding was abandoned.

We contend that the decision in the *Wixon* case, on familiar principles, barred re-litigation of the issue of Communist membership prior to 1941. The Government contends (memorandum on certiorari, pp. 13-14) and the Court below agreed (199 F. 2d at 826-27) that the *Wixon* case held only that the administrative hearing was unfair, and did not reach the factual issue of membership. Likewise, the Government makes the same argument, with respect to the period of time involved, which has already been examined in connection with the Landis-Perkins decision (*supra*, pp. 62) with the additional contention (memorandum on certiorari, p. 15, footnote 8) that "To establish the falsity of the 1945 statement the Government did not rely [at the

trial under this indictment] on the evidence which had been introduced at the prior deportation hearings. All of the Government witnesses were new." None of these arguments is valid.[67]

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[67]Other statements in the decision below in support of its holding that the *Wixon* case is of no effect in this proceeding seem not to warrant detailed analysis. (1) "The matter in court was habeas corpus, and the Communist issue was not in the case" (199 F. 2d at 827). The second clause of this sentence can only be characterized as extraordinary in view of the careful analysis, in both the majority and minority opinions of this Court in the *Wixon* case, of the question whether there was evidence to support the administrative finding (326 U. S., at 149-157, 166-178). As for the reference to *habeas corpus*, though it is well-settled that a judgment *refusing* to discharge a petitioner (though it may be persuasive) is not *res judicata* (*Salinger* v. *Loisel*, 265 U. S. 224, 230; *Waley* v. *Johnston*, 316 U. S. 101, 105), a judgment which does discharge a prisoner is *res judicata* at least as to "all the facts and circumstances which came" up in the original proceedings. *United States* v. *Chung Shee*, 76 Fed. 951, 956 (9th Cir.), affirming the more extended district court opinion, *id.*, 71 Fed. 277, 279 (S. D. Cal.), which in turn quotes the relevant portion of *Freeman on Judgments* for the distinction here made. *Chung Shee* is cited by this Court in *Collins* v. *Loisel*, 262 U. S. 426, 430, where the Court notes that a discharge on *habeas corpus* operates as *res judicata* of the issues of law and fact necessarily involved in that result. See *Harris* v. *Biszkowicz*, 100 F. 2d 854 (8th Cir.); *Ex parte Reaves*, 121 Fed. 848 (M. D. Ala.). And in *Heikkila* v. *Barber*, 21 L.W. 4249, March 16, 1953, this Court expressly stated that the reason for limiting an alien to the writ of *habeas corpus* was "to minimize opportunities for repetitious litigation and consequent delays. . . ."

(2) "Of course, the issue in none of the former hearings was as to Bridges' being a Communist. . . . an allegation that a person was a Communist was not per se an allegation of a crime, while the allegation that one conspired to destroy the Government by force or violence stated a crime" (199 F. 2d at 826-27). Of course, this is the sheerest legal fiction. Bridges was not charged before either Mr. Landis or Judge Sears with conspiring to destroy the Government by force and violence, but with being a member of the organization which advocated the violent overthrow of the Government. In each of the administrative proceedings, the Government specified that the organization in question was the Communist Party (*supra*, pp. 5, 7). Therefore, the precise issue in both administrative proceedings was whether or not Bridges was a member of the Communist Party.

1. *Bridges* v. *Wixon* held that there was no evidence to support the administrative conclusion that Bridges was a member of the Communist Party.

The Government's effort to rule the *Wixon* case out of the present proceeding is bottomed on the single circumstance that Judge Sears admitted, as substantive evidence against Bridges, hearsay evidence of an unsworn statement of one James D. O'Neil, and that both Judge Sears and the Attorney-General relied heavily on this evidence in reaching their conclusion that Bridges was a member of the Communist Party. In the *Wixon* case, this Court held that it was error to admit O'Neil's statement as substantive evidence. On that basis, the Court below said (199 F. 2d at 827) that the *Wixon* case "goes no farther than to declare what was the proper administrative procedure to be followed", and the Government contends (memorandum on certiorari, p. 13) that the case held only that the administrative hearing was "unfair".

But this reading of the *Wixon* case is wholly untenable in the light of the issue before this Court and the language of both majority and minority opinions. In the majority opinion (Mr. Justice Douglas) it was explicitly stated that a deportation order cannot be overturned on due process grounds "by showing that incompetent evidence was admitted and considered" (326 U. S. at 156, citing *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106). Under the decisions of this Court, the issue in the *Wixon* case was whether there was evidence—sometimes described as "some" evidence, "any" evidence, or evidence "more than a scintilla, and not unbelievable on its face"—to support the Attorney-General's finding that Bridges was a Communist. *Tisi* v. *Tod*, 264 U. S. 131. That this was the issue before the Court was recognized in both the majority.

pinion (326 U. S. at 149: "In these *habeas corpus* proceedngs we do not review the evidence beyond ascertaining hat there is some evidence to support the deportation order", iting the *Vajtauer* case), and in the minority opinion of Chief Justice Stone (326 U. S. at 166, 170-171).

The history of the Sears-Biddle proceeding bears out hat the evidentiary question was determinative. Judge Sears, as was stated in the Attorney-General's decision, ejected much of the Government's evidence on membership as "untrustworthy, contradictory, or unreliable."[68] The Attorney-General relied primarily, if not exclusively, on he testimony of Harry Lundeberg and the unsworn statement of O'Neil.[69] When Bridges' petition for a writ of *habeas corpus* reached this Court, the primary point in both his and the Government's brief was whether there was sufficient evidence to support the administrative finding (Brief for petitioner in the *Wixon* case, pp. 29-65; brief for the Government therein, pp. 13-15, 18-93).[70]

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[68] *Harry Bridges before the Attorney-General in Deportation Proceedings* (U. S. Dept. of Justice, May 28, 1942), p. 18; Appendix, pp. 39-41.

[69] *Id.*, at pp. 18-24. As to seven other witnesses whose testimony was characterized by Judge Sears as "inconclusive, unreliable, or contradictory" (*Id.* at p. 25), the Attorney-General declared (*Id.* at p. 26) that "taken as a whole it cannot, because of its volume, be completely disregarded", but this seems to be stated with reference to "affiliation" rather than "membership."

[70] There were, of course, numerous other points involved. At each stage of the Sears-Biddle proceeding, Bridges pleaded the Landis-Perkins decision in bar as *res judicata*. Judge Sears rejected the argument because the evidence was presented by a new set of witnesses (*infra*, pp. 71-72), a greater period of time was covered by the charge, and on the *Pearson* case (*In the Matter of Harry Renton Bridges*, Immigration and Naturalization Service, Department of Justice, File No. 55973/217, Memorandum of Decision, at p. 17). The Board of Immigration Appeals discussed but, because of their finding that the evidence was insufficient, did not decide the point. The Attorney-General relied exclusively on *Pearson v. Williams*, 202 U. S. 281 (*Harry Bridges before the Attorney-General in Deportation Proceedings* (U. S. Government Printing Office, 1942) at p. 30). This Court, presumably because it disposed of the case on other grounds, did not advert to the *res judicata* question (326 U. S. at 156-157).

In this Court, therefore, the "membership" issue was whether the evidence of O'Neil and Lundeberg was sufficient to support the administrative finding. The dissenting justices thought Lundeberg's testimony alone sufficient (326 U. S. at 174). The majority opinion held O'Neil's statement incompetent (while recognizing that the administrative finding could not be overturned for that reason alone, 326 U. S. at 156), and that the finding of membership could not be sustained if O'Neil's statement was excluded from consideration.[71] The Court gave weight to the fact (326 U. S. at 156) that "the Board of Immigration Appeals significantly concluded that apart from O'Neil's unsworn statements the evidence of Bridges' membership was too flimsy to support a finding" and drew from this the conclusion that it would be "idle to consider what the Attorney-General might have ruled on the basis of the other evidence before him", citing, by comparison, *United States* v. *Dunton*, 291 Fed. 905 (S. D. N. Y.).

In the *Dunton* case, Judge Learned Hand held, in an exclusion case on *habeas corpus*, that the Secretary of Labor, reversing a board of special inquiry which voted to admit the alien, had improperly considered certain evidence not adduced before the board. Judge Hand granted the writ, saying (291 Fed. at 907):

> "It is idle to speculate upon what the board might have done if they had received it [the evidence im-

[71]The Court noted (326 U. S. at 155) that the Attorney-General did not find that Lundeberg's testimony alone was sufficient (the dissenting justices disagreed with this interpretation), though the Court reserved the question of what conclusion it would have reached had the Attorney-General found that testimony alone sufficient. The Attorney-General's failure to find Lundeberg's testimony alone sufficient thus furnished additional support for this Court's parallel conclusion.

> properly considered by the Secretary [. . . there can be no question that without it there was no color for reversal, nothing but the most trivial inconsistencies."

Quite clearly, the citation of the *Dunton* case at that point in the Court's opinion means that, lacking the O'Neil statement, the Attorney-General had no evidence before him sufficient to warrant reversing the Board of Immigration Appeals or to support a finding that Bridges was a Communist.[72]

If there are any doubts about the conclusiveness of the *Wixon* case,[73] they certainly did not occur to the Government when the decision was handed down. No effort was made to resume the deportation proceeding;[74] no effort was

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[72] It is also to be noted that the court below, albeit inconsistently with their refusal to give effect to the *Wixon* case, stated (199 F. 2d at 827): "The Supreme Court, therefore, concluded that the administrative decision approving an executive order to deport Bridges could not be sustained since it was not supported by substantial evidence." Technically, as has been noted, the requirement in the *Wixon* case was not "substantial" but "some" evidence.

[73] "If the Court reverses the order, say, on the ground of lack of substantial evidence in the findings, then the *res judicata* effect probably ought to be the same as if the agency had held the other way on the issue in the first instance, with the added effect that the Court's holding is itself *res judicata* on the issue of substantial evidence, as well as on the other issues that might have been raised in the proceeding on judicial review." Davis, *Administrative Law* (1951), p. 611.

[74] Compare *Bryan* v. *United States*, 338 U. S. 552, wherein it was held (on a direct appeal from a criminal conviction, as distinguished from collateral review as in *habeas corpus*) that the circuit courts of appeal, when reversing a conviction for insufficient evidence, can either direct a new trial (even though the defendant's motion at trial for a directed verdict of acquittal was erroneously denied) or a judgment of acquittal. When the former course is followed, it "leaves the Government free to retry the case or to dismiss it if no additional evidence . . . be obtainable." See *Caringella* v. *United States*, 78 F. 2d 563, 567 (7th Cir.). If it be assumed that the rule of the *Bryan* case applies to the *Wixon* decision, the Government followed the latter course mentioned in the *Caringella* case.

made to adduce additional evidence to support the administrative finding, or to give the Attorney-General an opportunity to rule on the sufficiency of Lundeberg's testimony standing alone.[75] Bridges' bail was released and the Government appears to have treated the *Wixon* decision in all respects as a final and conclusive adjudication of the issue, as indeed it was.[76]

2. Because the *Wixon* case was not given effect in this proceeding, the judgment below must be reversed.

Obviously the trial court's failure to restrict the issue for the jury to the period after 1941[77] was seriously prejudicial. The great bulk of the evidence introduced by the Government at the trial related to the same years of the mid-thirties that were covered by the witnesses called in the prior administrative proceedings (Appendix, pp. 36-37). The opinion of the court below (199 F. 2d at 834-45) contains an extensive review of the evidence. The evidence dealing with events subsequent to 1941 was such as (Appendix, pp. 41-43) "would not in itself suffice" to sustain the convictions (199 F. 2d 837, especially n. 8). Indeed, for this

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[75]The administrative regulations of the Immigration and Naturalization Service are set out in the Appendix, pp. 27-31. These specifically gave the Board of Immigration Appeals the authority to re-open a case.

[76]Immediately thereafter, when Bridges applied for naturalization, the Government interposed no objection. *Infra*, p. 72. The question whether the *Wixon* case or the Landis-Perkins decision would have been *res judicata* in the naturalization proceedings on the issue of Communist membership and affiliation, therefore, did not arise.

[77]There may be some question whether the precise governing date should be February 12, 1941 (the date of the warrant involved in the Sears-Biddle proceeding), or September 26, 1941 (the date of the Sears report). See Mr. Landis' comment on this type of question, *supra*, p. 63, n. 65.

purpose, it is quite immaterial whether one adopts the time of the Landis-Perkins or the Sears-Biddle decision. And, as has been stated (*supra*, pp. 54, 62-63), the defendants made all possible motions to limit the evidence and restrict the issue for the jury as to each significant date in both administrative proceedings.

To support the notion that relitigation of the factual issue of Bridges' Communist membership prior to 1940 was permissible, the Government has said (memorandum on certiorari, p. 15, footnote 8) only that: "To establish the falsity of the 1945 statement the Government did not rely on the evidence which had been introduced at the prior deportation hearings. All of the Government's witnesses were new." What is the purpose of this remarkable statement? That the Government abandoned the witnesses discredited in the earlier proceedings (Appendix, pp. 38-41), and felt obliged to dredge up and rely upon an entirely new lot, is indeed interesting, but quite irrelevant to the point at issue. The question is not whether the prosecution's evidence came from new witnesses, but whether the issue which went to the jury was, in whole or in part, the same issue as had been litigated before. *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48; *Sealfon* v. *United States*, 332 U. S. 575, 578; *United States* v. *Balt. & Ohio R. R. Co.*, 229 U. S. 244.

Whatever the purpose of the Government's statement, the fact that the witnesses were new has no bearing on the legal issues of *res judicata* and estoppel which are here under consideration, as the Government itself earlier acknowledged in its brief submitted to this Court in the *Wixon* case, wherein it is stated (at p. 99): "Although we do not understand that diversity of the evidence presented in two pro-

ceedings on the same issue bars the principle of *res judicata*, it is worth remarking that no witnesses offered by the Government at the second hearing had testified at the first." With all respect, we suggest that it was no more worth so remarking at the time of the *Wixon* case than it is at present.

C. The Naturalization Decree of September 17, 1945 is *Res Judicata* of the Issues therein Determined, including that of Bridges' Alleged Communist Party Membership; Therefore the Judgment below must be Reversed and the Indictment Dismissed.

On June 23, 1945 (five days after the decision in the *Wixon* case), Bridges filed his preliminary form for a petition for naturalization. The subsequent steps leading up to his naturalization by decree of the California Superior Court have already been described (*supra*, pp. 8-9; Tr. 102-145). The Government interposed no objection to Bridges' naturalization (Tr. 144).

Bridges was expressly asked and expressly denied present or former membership (Tr. 138), and an affidavit charging him with membership was offered "for what it is worth" by the Government's representative (Tr. 139-142). In granting the decree, therefore, the naturalization court determined that Bridges was not and had not been a Communist.

The naturalization decree was *res judicata* of the very issue in the present criminal proceeding. *Chitwood* v. *United States*, 178 Fed. 442 (8th Cir.); see *Tutun* v. *United States*, 270 U. S. 568, 577; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 298-9; *cf. United States* v. *Throckmorton*, 98 U. S. 61. The factual question in both cases was precisely the same. That a naturalization decree is

a "case or controversy" in the judicial sense has long been settled, as is the corollary that such a decree is a final adjudication which must be accepted by other courts as complete evidence of its own validity, and carries the attributes of *res judicata*. As Chief Justice Marshall said in *Spratt* v. *Spratt*, 4 Pet. 393, 407-408 (U. S., 1831):

> "The various acts upon the subject submit the decision of the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity.
>
> "The inconvenience which might arise from this principle has been pressed upon the court; but the inconvenience might be still greater if the opposite opinion be established."

In line with these views, Mr. Justice Brandeis held in the *Tutun* case, *supra* at 577:

> "The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By § 11 of the Naturalization Act the full rights of a litigant are expressly reserved to it. . . . Its contentions are submitted to the court for adjudication. . . . The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. . . . It may not be

> collaterally attacked. . . . If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit."

In *Knauer* v. *United States*, 328 U. S. 654, relied on by the Government as denying the *res judicata* attributes of a naturalization decree (memorandum on certiorari, pp. 15-16), the Government brought suit to cancel a naturalization certificate, in line with the last sentence quoted above from the *Tutun* case. The issue in the case was whether Knauer committed a fraud by taking a false oath of allegiance. Knauer pleaded the naturalization decree in bar as *res judicata*, and this Court's rejection of the plea[78] is the basis of the Government's contention that Bridges' naturalization decree was not conclusive of the issue here.

But the *Knauer* case does not even settle the question whether the decree here would be *res judicata* of the membership issue in a denaturalization proceeding against Bridges (as distinguished from the criminal charge here involved). For the *Knauer* decision was grounded narrowly on the fact that Knauer's oath of allegiance related "to a state of mind . . . and promise of future conduct" and not to "issues of fact", as here (328 U. S. at 670, 671):

> "It is said, however, that the issue of fraud may not be tried in this case. An analogy is sought to be drawn to those cases where relief against a prior

[78]Other cases where the naturalization certificate has been cancelled have involved jurisdictional defects, as in *United States* v. *Ness*, 245 U. S. 319; *Johannessen* v. *United States*, 225 U. S. 227; *United States* v. *Ginsberg*, 243 U. S. 472. In the *Ness* case, the Court pointed out (at 325) that the naturalization decree "is, though clearly erroneous, conclusive even as against the United States if it entered an appearance" on evidentiary and procedural matters.

judgment, on the ground that perjured testimony was introduced at the trial, was denied. *United States* v. *Throckmorton*, 98 U. S. 61, 66 . . . But that rule goes no further than to say that the issue of fraud can become *res judicata* in the judgment sought to be set aside. We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires for swearing of all allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath[79] was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated."

The *Knauer* case, therefore, expressly reserved "the extent to which a decree of naturalization may constitute a final determination of issues of fact" in denaturalization proceedings. But the question so reserved is not the question here, and even if resolved favorably to the Government,

[79]The Government's quotation of the balance of this sentence following the footnote (memorandum on certiorari pp. 15-16) omitted the words "in the oath", which of course limit the meaning of the sentence and make it wholly inapplicable to the present case.

would be of no avail to it here. For this is not a proceeding to cancel a certificate of naturalization; it is, *per contra,* a *collateral attack* on the naturalization decree by means of a criminal indictment for false swearing—the very kind of attack against the decree which, under the *Tutun* case, must be treated as a final adjudication, protected against collateral attack.[80] And here, the issue of Bridges' Communist membership, determined by the denaturalization decree, is the very issue on which the indictment for false swearing is based. *Chitwood* v. *United States, supra.* Furthermore, the Government has in fact instituted a proceeding to cancel Bridges' naturalization certificate, but that proceeding has been stayed, *at the Government's own request and over the petitioners' objection. United States* v. *Bridges,* 86 F. Supp. 931 (N. D. Cal.). The Government is now asking this Court to do precisely what the *Tutun* case said cannot be done. See also *United States* v. *Hamilton,* 157 Fed. 569 (C. C. S. D. N. Y.).

The Government complains (memorandum on certiorari, p. 15) that "It would indeed be an odd application of the principle of *res judicata* to bar the Government from protecting the integrity of its own proceedings on the ground that the final order in those proceedings precludes a further inquiry, criminal or otherwise, as to whether the legal proceedings had been abused". But the proper channel for such inquiry[81]—a suit to cancel the certificate—has been stopped by the Government's own act.

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[80] If "the issue of fraud can become *res judicata*" for purposes of a suit to cancel a certificate, *a fortiori* it can for purposes of collateral attack.

[81] In *Bindczyck* v. *Finucane,* 342 U. S. 76, a civil denaturalization case, Mr. Justice Frankfurter reviewed the naturalization statutes and their legislative history and concluded that civil denaturalization is the *exclusive* procedure for reaching fraudulent or illegal procurement of naturalization.

The vice of the Government's position, however, lies far deeper. Naturalization proceedings are not the Government's "own", as Mr. Justice Brandeis made clear in the *Tutun* case. And the policies underlying the principles of *res judicata* apply to litigation between a government and a private citizen as much as to suits between individuals. That principle rests not only on the general policy of repose and a realization that a proceeding to set aside an earlier judgment fraudulently obtained, is it-

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(n. 81 cont.)

"In the light of this legislative history we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, Congress formulated a self-contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provision of Section 15. . . .

Between them, these two sections, Section 11 and Section 15, provided a complete and exclusive framework for safeguarding citizenship against unqualified applicants. Under the first, the Government was given ample opportunity to interpose objections prior to the order of naturalization. If proper account was not taken of the evidence, the Government had recourse to appeal for examination of the action of the naturalizing court on the record. . . . At the expiration of that time, if citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in Section 15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. Every national interest is thereby protected." (*Id.* at pp. 83-4)

The revocation in *Bindczyck* v. *Finucane* was held invalid for failure to utilize the statutory procedure of Section 15.

In *Bindczyck* this Court was dealing with an attempted revocation of naturalization on the ground that Bindczyck swore falsely concerning his loyalty to the United States. This, the Court said, was an issue to be established outside the record (342 U. S. at 85, n. 9). So to the question of whether Bridges swore falsely must be determined outside the record of his naturalization proceedings.

self no more immune to fraud than the earlier one. It also grows out of the courts' awareness that "the aid of judicial tribunals would not be invoked . . . if . . . conclusiveness did not attend the judgments of such tribunals." See *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 49. The principle is thus based "on full and solid reason" (*Sperry's Case* [1591], 5 Co. 61, 77 Eng. Rep. 148), and "in the long run the ends of equity and strict justice both are served best by holding strictly to the rule. *Queen* v. *Hartington,* 4 El. & Bl. 780, 119 Eng. Rep. 288 (1855). And it is especially applicable to an adjudication of naturalization, so that the decree granting citizenship shall be stable, like other judicial decrees, and not vulnerable to attack on grounds from which other judgments are immune, by accusations that false testimony was offered.

A glance at the naturalization laws and regulations shows the wisdom of this conclusion, and of the rule announced in the *Tutun* case. These are carefully drawn to afford the Government ample time to investigate the facts with respect to the alien's qualifications, and to challenge the naturalization petition if doubts are raised (Appendix, pp. 9-11, 31-35). The Government is allowed the fullest opportunity to oppose the application at the final hearing. If naturalization is granted over the Government's opposition, it may appeal, whether the decree be granted by a federal court (*Tutun* v. *United States, supra*), or a state court. *In re Clark,* 301 Pa. 321, 152 Atl. 192; *cf. In re Bogunovic,* 18 Cal. 2d 160, 114 Pac. 2d 581. As Mr. Justice Frankfurter stated in this Court's opinion in *Bindczyck* v. *Finucane,* 342 U. S. 76, 80-1:

> "To prevent fraud in a proceeding before a naturalization court, the Act devised a scheme of

> administrative oversight for the naturalization process. The Government was given the right to appear. . . . This right was fortified by requiring notice of the petition to the newly created Bureau of Immigration and Naturalization and a ninety day waiting period between the filing of the petition and the final hearing. . . . These were safeguards to enable verification by the Bureau of the facts alleged in the petition and investigation of the qualifications of the applicant for citizenship."

Surely it is difficult to conceive of a case in which the application of the *Tutun* rule is less likely to reach an unfair result than the present one. For nothing is clearer than that the Government had ample notice of the accusation that Bridges was a Communist. The issue was not of a concealed nature as in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238; *cf. United States* v. *Throckmorton*, 98 U. S. 61. Despite its possession of the fruits of years of investigation, the Government made no effort to oppose his naturalization, took no appeal from the decree, and allowed the period of limitations to expire before attempting to re-open the issue —by way of collateral attack. This Court should follow "the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong." See *Reed* v. *Allen*, 286 U. S. 191, 201.

D. This Indictment is barred by the Due Process Clause of the Fifth Amendment.

The petitioner Bridges during the last fifteen years (1) has been subjected to an administrative trial in 1939

on the charge of membership in the Communist Party,[82] which terminated in his favor in 1940; (2) has been subjected to a second administrative trial in 1941 on the charge of past or present Communist membership which, after judicial review in this Court, terminated in his favor in 1945; (3) has established his non-membership in his naturalization proceeding in 1945; and (4) has been subjected since 1949 to a criminal trial for denying Communist membership, which has reached this Court in 1953.

The present indictment, which puts Bridges in jeopardy on the same issue which has thrice been determined in his favor, and which is the Government's third effort to punish him, by imprisonment or deportation, is barred under the due process clause of the Fifth Amendment.[83] If not double jeopardy in the technical sense,[84] the laying of this indictment nevertheless violated well-settled judicial principles of justice and fairness which are embodied in the due process clause. The Government cannot conduct its proceedings against an individual in such a manner as to offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". See *Snyder* v. *Massachusetts*, 291 U. S. 97, 105;

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[82]Prior to 1939, the same petitioner was subjected to a series of investigations of the charge that he was a member of the Communist Party. All of them failed to sustain the charge (*supra*, p. 4).

[83]If it is impossible for us to cite any judicial holding which squarely supports this proposition, it is because the factual situation is itself unprecedented; the Government is equally unable to cite any holding to the contrary.

[84]The technical requirements of double jeopardy as declared in the precedents may not be met here, inasmuch as the prior determinations were not made in criminal proceedings. Members of this Court have, however, indicated that the "double jeopardy" clause should not be so restricted in its application. See the dissenting opinion in *Wade* v. *Hunter*, 336 U. S. 684, 694.

Mr. Justice Frankfurter, concurring; in *Frances* v. *Resweber*, 329 U. S. 459, 469.

Administrative decisions in recent years have often assumed proportions as momentous to individuals as criminal prosecutions. Deportation proceedings are perhaps the plainest example. See *Bridges* v. *Wixon*, *supra*, at p. 147. Although the prior proceedings against Bridges were not technically criminal in character, they were certainly penal. *Ng Fung Ho.* v. *United States*, 259 U. S. 276; *Wallis* v. *Tecchio*, 65 F. 2d 250 (5th Cir.); *Browne* v. *Zurbrick*, 45 F. 2d 931 (6th Cir.). The Fifth Amendment forbids double jeopardy as to even a trifling criminal offense. Its broader guaranty of due process of law extends at least the basic protections of the judicial process to all types of proceedings, whether or not known in 1789.

Under the decision below, the Government can follow one protracted and exhausting proceeding with another. If that can be done, there will come a proceeding, whether it be the second or the seventh, when the Government may get the result it wants. The entire course of proceedings with respect to Bridges embodies repetitious charges based upon the same factual issue, disregard of the salutary policy of repose, and harassment of an individual on the same charge over the course of fifteen or more years. This cannot be squared either with rudimentary concepts of fair play, or with the Fifth Amendment. This Court should examine "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." See *Adamson* v. *California*, 332 U. S. 46, 67-68.

In *United States* v. *Ball*, 163 U. S. 662, it was held that a *defendant* who had appealed from a conviction could not plead the conviction in bar against a second trial in the same proceeding. A contrary result was reached in *Kepner* v. *United States*, 195 U. S. 100, where, after an acquittal, the *state* secured a reversal of the judgment. In *Trono* v. *United States*, 199 U. S. 521, the distinction between these earlier cases was explained on the basis that the defendant, by appealing, "waives" his right to plead jeopardy. Mr. Justice Holmes dissented in the *Kepner* case (and, for the reasons set forth in his dissent, concurred in the result but not in the opinion in the *Trono* case), because, in his view (195 U. S. at 134) "a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. . . . Everybody agrees that the principle (against double jeopardy) in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once". "Waiver", in his opinion, corresponded neither to the law nor to the psychology of defendants.

Since the *Trono* case, this Court has rendered a series of decisions restricting the scope of both the "double jeopardy" clause of the Fifth and the "due process" clauses of the Fifth and Fourteenth Amendments[85] as applied to successive trials in the same proceeding.[86] However during

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[85]The distinction between the effect of the two clauses has been sharply drawn in criminal cases coming to this Court from the state courts, since the Fifth Amendment applies to the federal government but not to the states, and since the due process clause of the Fourteenth Amendment does not encompass the whole body of the Bill of Rights, or the entire reach of "double jeopardy". See, *e.g.*, *Palko* v. *Connecticut*, 302 U. S. 319.

[86]See *Stroud* v. *United States*, 251 U. S. 15, where a defendant, convicted of first degree murder without capital punishment, obtained a reversal of his conviction, and at the second trial was again convicted and sentenced to be hanged; *Palko* v. *Connecticut*, 302 U. S. 19, where after a conviction for second degree murder, the State

this sequence of decisions holding the double jeopardy and due process clauses inapplicable to successive trials *in the same proceeding*, there have been constant warnings that the doctrine of these cases by no means applies to situations where the defendant has been subjected to *multiple and repetitious proceedings*.

In *United States* v. *Oppenheimer*, 242 U. S. 85, a *new* indictment was brought on the same charge after an earlier one had been dismissed by virtue of an erroneous application of a statute of limitations. This Court held that, although there had been no double jeopardy, the second proceeding was barred by *res judicata*, which Mr. Justice Holmes (who had dissented in the much harsher circumstances of the *Kepner* case, on the ground that only a single proceeding was there involved) described (242 U. S. at 88) as "a fundamental principle of justice". Writing for a unanimous court, the Justice thus projected the distinction (earlier stated in his dissent in the *Kepner* case) between subjecting a defendant to multiple and repetitious charges, and carrying a single proceeding through to a final conclusion.

Precisely the same, fundamental distinction was drawn by Mr. Justice Cardozo in the *Palko* case (302 U. S. at 328): "The state is not attempting to wear the accused out

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appealed, obtained a reversal of the judgment and, at the second trial a conviction of first degree murder; *Bryan* v. *United States*, 338 U. S. 552, where after a criminal conviction was set aside on the defendant's appeal for insufficient evidence, the appellate court directed a new trial even though the defendant's motion for a verdict of acquittal had been erroneously denied; *Brock* v. *North Carolina*, 344 U. S. 424, where after the defendant was on trial and in jeopardy the State requested and was granted a mistrial and a continuance because prosecution witnesses had refused to testify on the grounds of self-incrimination, a second trial on the same indictment was held not to violate due process.

by a multitude of cases with accumulated trials. It asks no more than this, that the case against them shall go on until there shall be a trial free from the corrosion of substantial legal error". Five years later, in *United States ex rel Marcus* v. *Hess*, 317 U. S. 537, Mr. Justice Frankfurter, concurring stated (at 556): "If it be suggested that a succession of separate trials for the enforcement of a great number of criminal sanctions . . . might be a form of cruelty or oppression, the answer is that the Constitution itself has guarded against such an attempt 'to wear the accused out by a multitude of cases with accumulated trials' ".

Condemnation of multiple proceedings against an accused was most recently heard in this Court in *Brock* v. *North Carolina*, 344 U. S. 424, in both concurring and dissenting opinions. Chief Justice Vinson, dissenting, once again quoted (at 439) Justice Cardozo's opinion from the *Palko* case about "a multitude of cases with accumulated trials." He also thought it wrong that the door be opened to the discontinuance of a trial in order that the State (at 431) "might present a stronger case at some later trial". Mr. Justice Frankfurter, concurring, thought that the state court's conclusion that the mistrial was waranted should not be disturbed but stated (at 429): "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

In the present case, the Government is seeking to do precisely what was condemned by Justice Cardozo in the *Palko* case, and by Chief Justice Vinson and Mr. Justice

Frankfurter in the *Brock* case. The Government has shifted from one statute to another, from one type of action to another, and one forum to another in order to see if it (344 U. S. at 429) "cannot do better a second time"—except that this is the fourth time. In the scale of due process, these things cannot be overlooked merely because the earlier proceedings were not technically criminal, and put Bridges in jeopardy of deportation rather than incarceration.

The disregard here of traditional principles and rudimentary concepts of fair play has led to the perpetration of the very abuses which those principles and concepts are intended to prevent. Fifteen years ago, before Dean Landis, the Government produced witnesses, among whom, in the words of the adjudicator, were "a self-confessed liar"; one to whom "truth matters little"; "a weak-willed, characterless individual . . . who in desperation was now pursuing new hypocritical tactics"; one whose testimony contained "amazing contradictions, and impossible situations" (Appendix, pp. 38-39). At the time of the Landis hearing, the events in question were relatively fresh, and the adjudicator found no evidence to sustain the charge against Bridges. The following year, when the issue was still relatively fresh, the Government again presented witnesses whose testimony was rejected by Judge Sears and the Attorney General "as being untrustworthy, contradictory, or unreliable". *Harry Bridges Before the Attorney General in Deportation Proceedings* (U. S. Government Printing Office, 1942) p. 18 (Appendix pp. 39-41). This Court held that the evidence not rejected in the administrative proceeding was insufficient to support the finding of membership. Nevertheless, in 1949, Bridges was faced with the

problem of controverting the testimony of a wholly new set of witnesses, relating to events by then ten or more years in the past. Apart from the staling of the issue, the tactics of the Government in its efforts to collect evidence and procure witnesses have been indefensible at many stages of the proceeding.[87]

To hold this indictment barred by the due process clause is not, therefore, an abstract act of reverence to the Constitution. True, this indictment would still be barred under Constitutional principles, whether or not all of fifteen years had passed since the first proceeding, and whether or not all or any of these abuses had been perpetrated by the Government: Over 125 years ago, it was said in *Commonwealth* v. *Old*, 5 Litt. 137 (Kentucky, 1824): "That every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration", and that preservation of the Constitutional safeguards is especially necessary "in a government like ours, so frequently subject to changes

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[87]Dean Landis found that an inmate of San Quentin Penitentiary had been solicited by a government official to give evidence against Bridges under the pressure of "withholding action that might release an assumedly innocent man (the inmate) from jail unless he produced certain testimony". *In the Matter of Harry R. Bridges, Findings and Conclusions of the Trial Examiner* (U. S. Government Printing Office, 1939), p. 73. Judge Sears found that Bridges' telephone wires had been unlawfully tapped by government agents while the proceeding was pending before him. *In the Matter of Harry Renton Bridges*, Immigration and Naturalization Service, Department of Justice, File No. 55973/217, Memorandum of Decision, pp. 182-185. At the trial in this very case, the Government produced witnesses who testified that Bridges had attended the National Convention of the Communist Party at New York City in 1936, although, as the court below found (199 F. 2d at 841): "it was established, apparently beyond controversy, that at the very time the 1936 Convention was being held, Bridges was in Stockton, California, making a speech at a union meeting."

in popular feeling and sentiment . . .".[88] There have been several such changes in the years since 1939, but under the Constitution the judicial disposition of criminal accusations must be governed by other and more permanent standards.

CONCLUSION

A case such as this one, involving as it does a long history and numerous and diverse legal questions, is extremely susceptible to fragmentation. Separate examination of each of its many elements is, of course, necessary, for the composite cannot be grasped without weighing and analyzing the components. In this brief we have, perforce, reviewed the case bit by bit and question by question—the several issues arising out of the statute of limitations; the scope and effect of each of the prior adjudications; the impact of the due process clause, and the application of *res judicata* and estoppel.

We have discussed the statute of limitations, the principles of *res judicata*, and the due process clause separately because they have distinct characteristics, and the precedents are found in different, though overlapping, clusters. But they are all based on the same ancient but timely judicial safeguards; they are components of a *corpus*. Many different expressions have been used to identify this policy: repose, security against stale demands, stability of rights and liabilities once determined and of status once established, protection against repetitious litigations, and many others.

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[88]This language was quoted with approval by this Court in *Ex parte Lang*, 18 Wall. 163 at 170-171 (U. S., 1873).

The statute of limitations, for example, embodies not only a policy of repose but also, like *res judicata* and due process, of justice and fairness. As Mr. Justice Story said in *Bell* v. *Morrison*, 1 Pet. 351, 360 (U. S., 1828), a statute of limitations "has a manifest tendency to . . . suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them." In default of limitations:

> "Parol evidence may be offered of confessions, (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate,) applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges."

In this very case, the evidence thought by the court below most damaging to Bridges (199 F. 2d at 838-39) consisted of alleged admissions by him of Communist membership, said to have been made in 1935 and 1938, more than a decade before this indictment was brought. Charging a jury on an indictment laid only 21 months after the offense charged, Baron Alderson declared (*Queen* v. *Robins*, 1 Cox C. C. 114 (1844)):

> "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted."

In conclusion, therefore, the many facets of the case must be allowed to strike the mind in conjunction rather than disparately, for it is all one case. In asking this Court to affirm the judgment below, the Government is seeking to uphold an indictment and conviction that:

(a) are based on strongly controverted testimony concerning events that took place 15 to 20 years ago;

(b) have rendered nugatory, and reached a result contrary to, carefully deliberated conclusions arrived at when the evidence was fresher;

(c) are barred by the statute of limitations unless the governing statutes be stretched to the breaking point and far beyond their settled judicial interpretation;

(d) are based on a retrial of a factual issue that had been thrice previously litigated between the parties, and cannot be sustained without undermining the basic and beneficial principles of *res judicata* and estoppel; and

(e) can be sustained only by reading out of the due process clause its protection against wearing out the accused "by a multitude of cases with accumulated trials" (*Palko* v. *Connecticut*, 302 U. S. at 328).

It is perhaps irrelevant to inquire what benefits the Government hopes will accrue if the charge against Bridges be now pressed home against him in the face of all these circumstances. But it is highly pertinent to inquire what the effect will be on the nature of the judicial process in America. In this case, there is ample reason to reverse the judgments of conviction under the applicable statutes and principles of law, without recourse to the Constitution. Nevertheless,

we urge that

> ". . . it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice . . ." (Mr. Justice Jackson, dissenting, in *Shaughnessy* v. *United States ex rel Mezei*, 21 L. W. 4242, March 16, 1953)

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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